Buffalo Law Review

Volume 16
Number 1 *The Common Law and the Civil Law: Some Encounter, Influences and Comparisons—Essays in Honor and Memory of Arthur Lenhoff (1885-1965)*

Article 11

10-1-1966

International Res Judicata in the Netherlands: A Comparative Analysis

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INTERNATIONAL RES JUDICATA IN THE NETHERLANDS: A COMPARATIVE ANALYSIS*

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I. INTRODUCTION

WHEN, on October 7, 1964, the Dutch legislature enacted an amended version of section 431 of the Code of Civil Procedure, it altered a provision that had been part of the code since its adoption in 1838.[1] Prior to its amendment, section 431, the principal provision of Dutch code law relating to recognition of foreign judgments,[2] had provided that foreign judgments could not be enforced within the Netherlands except in cases specifically provided for by law and that the underlying disputes could be brought anew before Dutch courts.[3]

In the course of time, original section 431, which even before its adoption had evoked criticism,[4] became the starting point for diverse theories concerning the effect to be given to foreign judgments in the Netherlands.[5] And although the Dutch Supreme Court, in a number of leading cases, had held that this provision did not prevent the granting of effect to a foreign judgment short of enforcement,[6] many of the uncertainties attendant upon its interpretation continued into present times.[7]

Those who had hoped that the Dutch legislature would use the opportunity

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The author gratefully acknowledges the assistance in gathering Dutch source materials rendered by Mr. S. K. Martens, LL.B., LL.M., Leyden University, member of the Bar of the Supreme Court of the Netherlands, and by Mr. Eric van Ginkel, LL.B., LL.M., Leyden University, research associate, Columbia University Project on European Legal Institutions.

1. The act amending § 431 was published in the Staatsblad [hereinafter S.] of 1964, No. 381, and became effective on November 11, 1964.

2. Section 431 has been called "the constitution of our law of international procedure and execution." See Jansen, Executie- en Beslagrecht 301 (1958).

3. In literal translation, paragraphs 1 and 2 of § 431 (old) read as follows:

> 1. Except in the cases expressly mentioned by law, no judgments rendered by foreign judges or courts may be executed within the Kingdom.
> 2. The disputes may be litigated before, and decided by, the Dutch judge anew.

Paragraphs 3 and 4 summarily regulated the procedure to be followed in obtaining execution of foreign judgments in the cases in which it was available. For the new text of paragraphs 1 and 2, see note 9 *infra*. On the proper interpretation of § 431, see also text at notes 16-40 *infra*.

4. See Lipman, Aanmerkingen op het Ontwerp van Wetboek van Burgerlijke Regtspleging, part 2, 46 (1828), quoted by 2 Meijers, Verzamelde Privaatrechtelijke Opstellen [hereinafter Opstellen] 311-12 (1955). Lipman posed the case of an Austrian judgment, rendered on a principal claim by a Dutch plaintiff and a counterclaim by an Austrian defendant, that awards relief to the Austrian litigant. According to him, such a judgment should reasonably be granted recognition in the Netherlands. For the view that this result can be attained under § 431, see text at notes 37-40 and 224-26 *infra*.

5. See text at notes 23-40 and 173-206 *infra*.

6. See cases cited in notes 176, 178, and 200 *infra* and accompanying text.

7. See text at notes 23-40, 103-174 *infra*.

afforded by the recent amendment to lay to rest existing problems and to provide workable guides for the future have been disappointed:[8] The amended version is merely a rephrasing of the old. The principal purpose of the amendment is to adjust the text of section 431 to the procedure prescribed for the execution of foreign judgments pursuant to a treaty or statute by sections 985 through 994 of the Code of Civil Procedure.[9]

The reluctance of the Dutch legislature to provide legislative solutions for problems unresolved by theory and case law is readily understandable. The relatively limited scope of the explorations by Dutch writers and case law of pertinent policies[10] and the variegated instances in which recognition of foreign

8. Even before the amendments were adopted, it had been argued that the merits of § 431 should be considered. See Funke, *Verlof tot tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels (Exequatur-ontwerp)*, 39 Nederlands Juristenblad [hereinafter cited N.J.B.] 484, 487 (1964).

9. The new version of § 431 reads in English translation:

1. Except for the provisions of sections 985 through 994, no decisions rendered by foreign judges may be executed within the Netherlands.
2. The disputes may be litigated before, and decided by, the Dutch judge anew.

The more elaborate prescriptions of §§ 985-994 were substituted for paragraphs 3 and 4 of § 431. See also note 3 *supra*.

10. See text at notes 49-64 *infra*. On recognition of foreign judgments generally, see Asser, *Onder welke voorwaarden moet de Nederlandsche wetgever uitvoerbaarheid verleenen aan de vonnissen van den buitenlandschen burgerlijken rechter?*, 19 Handelingen der Nederlandsche Juristen-Vereeniging [hereinafter Praeadvies N.J.V.] (1888); Asser, Schets van het Internationaal Privaatrecht 124-25 (1879); 5 Asser, Nederlands Burgerlijk Recht, 336-37 (5th ed. by Anema & Verdam 1953); Asser, Nederlands Burgerlijk Recht, Algemeen Deel 201-04 (2d ed. by Scholten 1945); Van Brakel, Grondslagen en Beginselen van Nederlands Internationaal Privaatrecht 118 (1950); Cohen, *Eenige opmerkingen naar aanleiding van de rechtspraak omtrent buitenlandsche vonnissen*, 85 Themis 181 (1924); Dolk, *"Art. 431 Rv."* 33 N.J.B. 576 (1958); Dubbink, *Het voorontwerp voor een E.E.G.-Verdrag over de rechterlijke bevoegdheid, de erkenning en executie van buitenlandse vonnissen in burgerlijke zaken en de executie van authentieke akten*, 13 Sociaal-Economische Wetgeving 601 (1965); 2 François, Handboek voor het Volkenrecht 104-13 (2d ed. 1949); Fransen van de Putte, *Regeling van de formaliteiten vereist voor de tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels in burgerlijke zaken*, 1964 Arbitrale Rechtspraak 159, 348; Funke, *Verlof tot tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels (Exequatur ontwerp)*, 39 N.J.B. 484, 511 (1964); Haardt, De Veroordeeling in de Kosten van het Burgerlijk Geding 179 (1945); ter Horst, *Gezag van vreemde vonnissen heir te lande*, 69 Weekblad voor Privaatrecht, Notaris-Ambt en Registratie [hereinafter W.P.N.R.] No. 3600 (1938); Hijmans, *Welke kracht behoort te worden toegekend aan beslissingen in burgerlijke en handelszaken van den buitenlandschen rechter (Scheidslieden daaronder niet begrepen)?*, Praeadvies N.J.V. 1929; Josephus Jitta, *Onder welke voorwaarden moet de Nederlandsche wetgever uitvoerbaarheid verleenen aan de vonnissen van den buitenlandschen burgerlijken rechter?*, Praeadvies N.J.V. 1888; Josephus Jitta, Internationaal Privaatrecht 628-31 (1916); Korthals Altes, *Nieuwe verdragen en een wetsontwerp betreffende de tenuitvoerlegging van rechterlijke beslissingen*, 43 Advocatenblad 309 (1963); Kosters, Het Internationaal Burgerlijk Recht in Nederland 213-21 (1917); Kosters & Dubbink, Algemeen Deel van het Nederlands Internationaal Privaatrecht 767-873 (1962); Meijers, *Het Bontmantelarrest*, 56 W.P.N.R. Nos. 2878, 2879, 2881 (1925), also published in 2 Opstellen 307-25 (1955); Meijers, *Het gezag van beslissingen in burgerlijke en handelszaken van den buitenlandschen rechter*, 60 W.P.N.R. No. 3104 (1929), also published in 2 Opstellen 326-32 (1955); Mulder, Inleiding tot het Nederlandsch Internationaal Privaatrecht 55 (2d ed. 1947); Nysingh, *Welke kracht behoort te worden toegekend aan beslissingen in burgerlijke en handelszaken van den buitenlandschen rechter (Scheidslieden daaronder niet begrepen)?*, Praeadvies N.J.V. 1929; Offerhaus, Nederlandsch Internationaal Bewijsrecht 150 (1918); Pitlo, Bewijs en Verjaring naar het Nederlands Burgerlijk Wetboek 104 (4th ed. 1957); Van Praag, *Welke kracht hebben in Nederland de door vreemde rechters in burgerlijke zaken gewezen vonnissen?*, 147 Rechtsgeleerd Magazijn [hereinafter R.M.] 339

judgments may be sought[11] would have rendered any attempt at legislative resolution beyond existing signposts a difficult undertaking. In these circumstances, although outright repeal of paragraphs 1 and 2 of section 431 would undoubtedly have been far more appropriate,[12] re-enactment of what is essentially the old text must have appeared to be an attractive solution.

Whatever the reasons for the solution adopted, the lack of deliberate change may not be construed as indicating legislative satisfaction with the provisions of paragraphs 1 and 2 of section 431.[13] These provisions have been the subject of frequent criticism, and there is no indication that the legislature intended to take a position in the controversies they have engendered. On the contrary, their re-enactment in unaltered form indicates at most a neutral attitude and leaves ample room for the development of appropriate rules concerning the recognition to be accorded to foreign judgments.

This article will attempt to formulate such rules in the light of pertinent policy considerations. Development of such rules would seem particularly appropriate in present times, in which efforts made to regulate the recognition of foreign judgments within the European Economic Community[14] inescapably prompt more general inquiries into the basis for according effect to foreign judgments, and in which the ever-growing intensity of international intercourse renders proper regulation of the recognition to be given to foreign judgments a matter of pressing concern.[15]

(1928); Van Praag, *De erkenning in Nederland van vreemde vonnissen van faillietverklaring en homologaties van akkoorden naar geldend recht buiten verdrag*, 48 R.M. 305 (1929); 2 Van Rossem & Cleveringa, Het Nederlandsche Wetboek van Burgerlijke Rechtsvordering, Annotations 1-6 on Article 431; Van Spengler, De kracht van buitenlandsche vonnissen gewezen in burgerlijke zaken (1926); Schröder, Gevolg van rechtsgang in den vreemde (1927); Schröder, *Executie van vreemde vonnissen*, 7 N.J.B. 285, 301 (1932); Star Busmann, Hoofdstukken van Burgerlijke Rechtsvordering 433-36 (1955); Wertheim, *Rechterlijke vrijhavens*, 71 W.P.N.R. Nos. 3668-71 (1940).

11. See text at notes 175-95 *infra*.

12. Funke, *supra* note 8, at 487, had suggested that the legislature either repeal or reformulate paragraph 2 of § 431. See further text at note 208 *infra*.

13. As Funke, *supra* note 8, at 487, points out, the Government's explanatory memorandum on the proposed amendment of § 431 contains nothing about the merits of paragraphs 1 and 2 of § 431.

14. On these efforts, see Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 Am. J. Comp. L. 323, 339-44 (1961).

15. The very fact that the Rome Treaty specifically mentions this subject in § 220 and that the EEC has taken steps to implement this article in the initial stages of its development bears telling testimony of this concern. It is also evidenced by the steadily increasing number of international agreements regulating the execution of foreign judgments and awards to which the Netherlands has become a party. See Treaty between the Netherlands and Belgium of March 28, 1925, 1929. No. 405 (effective Jan. 1, 1929); Convention on the recovery abroad of maintenance of June 20, 1956, 1957 Tractatenblad [hereinafter Trb.] 121 (effective August 30, 1962), 268 U.N.T.S. 32 (1957); Treaty between the Netherlands and Italy of April 17, 1959, 1959 Trb. 137 (effective May 18, 1963); Convention on the recognition and enforcement of foreign arbitral awards of June 10, 1958, 1958 Trb. 145 (effective July 23, 1964), 330 U.N.T.S. 38 (1959); Convention on the recognition and enforcement of decisions on support obligations toward children of April 15, 1958, 1959 Trb. 187 (effective April 28, 1964); Treaty between the Netherlands and Germany of August 30, 1962, 1963 Trb. 501 (effective Sept. 15, 1965).

II. The Legislative History of Section 431

Although the *Wetboek van Burgerlijke Rechtsvordering*[16] is derived directly from the French Code de Procédure Civile, its section 431 did not follow the corresponding section 546 of the French Code. The latter provided generally that foreign judgments could be executed in France only after some form of review of the merits;[17] the Dutch provision excluded execution altogether and provided for relitigation of the underlying dispute. This variation was the product of deliberate choice. Rather than follow the French Code, the drafters of the Dutch Code preferred to adopt the rule embodied in section 121 of the French Ordonnance sur la Procédure Civile of 1629, the so-called Code Michaud, which provided that foreign judgments would not be executed within the kingdom and that French subjects could relitigate the merits in France.[18] According to the government's explanatory comment upon its proposal, section 431 was designed to ensure that "nobody can be drawn away from his daily court."[19] Its purpose was, in other words, to discourage the bringing of suits against defendants before courts other than those of their domicile, the place where they would ordinarily be sued,[20] by not permitting execution upon judgments obtained in such suits. The reference to French subjects that appeared in section 121 of the Code Michaud was omitted, because the rule was thought properly applicable to all defendants.[21]

Historically, therefore, it may be argued on respectable grounds that section 431 was intended to preclude a foreign judgment creditor from obtaining in the

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16. This is the official Dutch name of what will hereinafter be called the Code of Civil Procedure. This Code became effective on October 1, 1838. Many of its provisions have subsequently been amended, but the majority of them and the Code's general scheme have been retained in unaltered form since 1838.

17. Under the French Code de Procédure Civile § 546, in conjunction with the French Code Civil § 2123, any foreign judgment that survives the limited review permitted by French law, can be enforced by execution in France. See Batiffol, Traité Elémentaire de Droit International Privé Nos. 740-96 (3d. ed. 1959). The scope of the *révision du fond* permitted by French law has recently been curtailed by the French Cour de Cassation. See Munzer v. Jacoby-Munzer, Cour de Cassation (Ch. civ., 1re sect.), Jan. 7, 1964, [1964] Bulletin des arrêts de la Cour de Cassation I., No. 15, p. 11.

18. On this aspect of the legislative history, see 2 Meijers, Opstellen 317-19 (1955).

19. In response to the question of whether an inhabitant of the Netherlands who had obtained a judgment abroad could obtain enforcement in the Netherlands, the Government stated:

> As a rule, it should be settled that a foreign judgment as *such* cannot be executed in this country, *because no one can be drawn away from his daily court* [italics supplied]. This does not prevent, however, that when this instrument evidences acts or consents on the part of Dutchmen, the court may and will take these into consideration, as it would an obligation contracted abroad, without the judgment's being therefore enforceable *as such.*

See 2 Noordziek, Geschiedenis der beraadslagingen, Wetboek van Burgerlijke Regtspleging 736 (1885). On the significance of the second sentence of this excerpt, see text at notes 30 and 217 *infra.*

20. The primary rule of Dutch in personam competence is that the defendant shall be sued before the court of his domicile. Code of Civil Procedure § 126(1). This rule, frequently expressed by the Latin adage *actor sequitur forum rei,* is the principal rule of in personam competence in European countries. See Weser, *supra* note 14, at 328-30.

21. See 2 Meijers, Opstellen 318 (1955).

Netherlands recognition of a judgment against a judgment debtor whom he had sued before a court other than that of the latter's domicile. If this were accepted as the section's objective, both paragraph 1 and paragraph 2 would make eminent sense: The legislature realized that the purpose it sought to achieve could be effectuated only if section 431 were to deny such a judgment execution (paragraph 1), and if it were further to ensure, by providing explicitly for relitigation of the merits, that the judgment creditor could not invoke his judgment as res judicata (paragraph 2). As will be shown below, this historical interpretation of section 431 also accords as far as possible with the policy considerations that should determine the effect to be given to foreign judgments.[22]

However, the view that section 431 applies only to judgments obtained abroad against a defendant sued away from his natural forum has not found general acceptance. Indeed, notwithstanding its persuasive historical support, it seems never to have been advanced in this precise form before. Before developing it in greater detail, a brief discussion of the various other theories evolved seems appropriate.

III. The Constructions Given to Section 431

A. *Introductory Remarks*

The principal problem to which the various theories evolved under the penumbra of section 431 have addressed themselves is whether and to what extent effect short of execution may be given to foreign judgments. All of them, rather than endeavor to limit the meaning of paragraph 1 to accord with its historical explanation and construe it as applying only to judgments rendered against defendants drawn away from their natural forum, have given paragraph 1 of section 431 the broad interpretation required by a literal reading. This failure to give paragraph 1 a properly limited construction has in large measure been responsible for the strained character of most of the theories that have been advanced.

B. *The Early Doctrine*

The first theory evolved under section 431 was that paragraph 1 does indeed prohibit execution of all foreign judgments, but that paragraph 2 prescribes relitigation of the merits only if the judgment debtor was sued away from his natural forum. It was first propounded shortly after adoption of the code[23] and subsequently endorsed by Kosters, then one of the leading authors in the field of private international law.[24]

As Meijers had noted, its weakness is that it gives a more limited scope to

22. See text at notes 207-08 *infra*.

23. See Lipman, in 4 Regtsgeleerd Bijblad, 314-15, (1842) quoted by 2 Meijers, Opstellen 312-13 (1955).

24. Kosters, Algemeen Deel van het Internationaal Burgerlijk Recht [hereinafter Algemeen Deel] 218-20 (1917). It was also embraced by Offerhaus, Nederlandsch Internationaal Bewijsrecht 146 (1918).

paragraph 2 than to paragraph 1, although both the language and the history of these paragraphs require that they be read as having co-extensive reach.[25] When paragraph 2, in providing for relitigation, speaks of "the" disputes,[26] it clearly refers to the disputes that led to the judgments of which paragraph 1 forbids execution. Furthermore, section 121 of the Code Michaud and an earlier draft of section 431 commence what eventually became paragraph 2 with a connecting term ("ains" and "dienvolgens") which indicates that paragraph 2 intended to deal only with disputes underlying the judgments described in paragraph 1.[27] However, this problem did not prompt the most likely explanation, namely, that paragraph 1 is of as limited scope as paragraph 2.

C. *The View that Section 431 Applies Only to Judgments Awarding Relief*

Starting from the premise that paragraph 1 clearly prohibits execution of all foreign judgments and that paragraph 2 has the same reach as paragraph 1, Meijers and others, in order to avoid a discrepancy in scope between paragraphs 1 and 2, have interpreted section 431 to apply only to judgments awarding some form of relief.[28] Supporting this view, it has been argued, is the plain meaning of section 431: Since only judgments awarding relief can form the basis for execution, it is clear that section 431 deals only with judgments of that nature. Further, since paragraphs 1 and 2 are of identical reach, paragraph 2 provides only for relitigation of disputes underlying foreign judgments that awarded relief. In regard to foreign judgments denying relief, section 431 provides no applicable rules.[29] Favoring this view are an explanatory comment of the government on proposed section 431 that suggests that under that section a Dutch court could accord effect to a foreign judgment as against the plaintiff in the foreign proceedings,[30] as well as the evident justice of saddling the plaintiff with the consequences of his choice by holding binding upon him a judgment that he himself elicited.[31]

25. 2 Meijers, Opstellen 320 (1955).

26. See the texts reproduced in notes 3 and 9 *supra*.

27. For the text of § 121 of the Code Michaud, sometimes also called Code Michaut, see Batiffol, *op. cit. supra* note 17, No. 740. For the text of the earlier draft of paragraph 2 of § 431, see 2 Meijers, Opstellen 314 (1955).

28. See 2 Meijers, Opstellen 321 (1955); 2 Van Rossem & Cleveringa, Het Nederlandsch Wetboek van Burgerlijke Rechtsvordering 24 (3d ed. 1934). It had previously been defended by Josephus Jitta, Het vonnis van faillietverklaring in het internationaal privaatrecht 124 (1880) and, as being the proper interpretation of § 121 of the Code Michaud, by 1 Boullenois, Traité de la Personnalité et de la Réalité des Lois 646 (1766).

29. See 2 Meijers, Opstellen 314, 321-22 (1955).

30. For the text of this comment, see note 19 *supra*.

31. This argument, as well as that derived from the legislative history, does, of course, support the granting of conclusive effect to foreign judgments rendered against the plaintiff in the foreign proceedings not only in cases of defensive, but also in cases of offensive, reliance on the foreign judgment in the Netherlands. Indeed, the serious drawback of the view discussed in the text is that it cannot satisfactorily cope with the evident injustice of permitting the defendant in the foreign proceedings to plead the foreign judgment as a bar, but of not permitting him to rely on the judgment in support of his claim for recovery of costs or counsel fees awarded him by the foreign court. The interpretation of § 431 espoused in this article avoids this objection. See also text at notes 37-40 and note 242 *infra*; Haardt, De Veroordeeling in de Kosten van het Burgerlijk Geding 183-89 (1945).

D. *The View that Section 431 Applies to All Foreign Judgments*

This is the view most generally accepted by the writers and endorsed by the Dutch Supreme Court.[32] In the *Swiss Child No. 2* case,[33] the Supreme Court, in holding that the Hague Court of Appeals had misapplied section 431 by granting conclusive effect to a Swiss judgment that ordered the defendant to pay support to his illegitimate child, stated:

> that the Court of Appeals, by holding itself legally bound to do so [*i.e.*, to grant conclusive effect to the Swiss judgment] has acted in violation of section 431 of the Code of Civil Procedure; that it may be conceded that this section does not preclude the Dutch court, while observing the principles of Dutch public policy, from determining in each particular case whether and to what extent authority should be accorded to a foreign judgment; that, however, a statutory rule which, except for here not relevant exceptions, forbids the execution in this country of foreign judgments and, in conjunction therewith, provides that the disputes may be brought before and adjudicated by the Dutch court anew, prohibits not only measures of execution to effectuate the award made by the foreign court, but such a rule is also incompatible with an obligation of the Dutch court to award relief because the foreign court has done so, or to find facts as the basis for his award merely because the foreign court has found these facts to be true in its judgment.[34]

Similar formulations can be found in other decisions,[35] but the one quoted, because it is the most explicit and extensive, is cited most frequently. The Supreme Court has never modified this interpretation and specifically the second sentence from the excerpt is frequently repeated in its decisions. It should be stressed, however, that the Supreme Court's construction is peculiarly ambivalent. On the one hand, it posits as dogma that section 431 forbids the granting of execution or res judicata effect to foreign judgments; but, on the other hand, it explicitly acknowledges that a Dutch court, without coming into conflict with section 431, may freely determine whether and to what extent to grant authority to a foreign judgment.[36]

In this context, mention should perhaps also be made of a variation on the view discussed in the text which has been defended by Voûte, but has gained few adherents. According to Voûte, Bijdrage tot het vraagstuk der buitenlandse vonnissen (1865), paragraph 2 of § 431 is applicable only to judgments awarding relief and even then only when the action brought in the Netherlands is on the foreign judgment rather than on the original claim for relief. This interpretation, which seems at odds both with the language of paragraph 2 and its history, is properly rejected by Meijers. See 2 Meijers, Opstellen 320-21 (1955).

32. See cases cited in notes 175-95 *infra* and accompanying text. Among the writers endorsing this view are Van Brakel, Grondslagen en Beginselen van Nederlandsch Internationaal Privaatrecht §§ 83-84 (1946); Star Busmann, Hoofdstukken van Burgerlijke Rechtsvordering Nos. 421-22 (2d ed. 1955), and authorities cited.

33. C.v.d.S. v. Bannier q.q., Hoge Raad, April 1, 1938, [1938] Nederlandse Jurisprudentie [hereinafter N.J.] No. 989.

34. [1938] N.J. No. 989, at 1411.

35. See, *e.g.*, cases cited in notes 178, 189, and 194 *infra*.

36. The only limitation imposed by the Supreme Court is that the lower courts must

E. *The View that Section 431 Applies Only to Foreign Judgments Rendered Against Defendants Sued Away from Their Natural Forums*

As indicated, this view finds solid support in the legislative history of section 431.[37] It considers paragraphs 1 and 2 of equal reach and therefore avoids the problem encountered by adherents of the earliest theory.[38] Furthermore, it permits, in proper circumstances, the granting of conclusive effect to judgments awarding relief, a non-attainable result under the view espoused by Meijers.[39] And finally, it would seem to reflect most closely the policies that should determine the effect to be given to foreign judgments.[40]

Before elaborating on this view and on the policies pertinent in this area, consideration should be given to the theoretical underpinning on which all of the various theories that do give any effect to foreign judgments must rely.

IV. The Effective Sources of Dutch Rules of International Res Judicata

A. *Introductory Remarks*

Under all of the various theories discussed, it is section 431, a statutory provision, that regulates in the first instance the effect to be given to foreign judgments. The peculiarity of this section is that it contains a negative prescription only. Irrespective of the scope given to it, section 431 defines merely what effect may not be given to foreign judgments.

However, even under the broad interpretation of section 431 embraced by the Supreme Court, it is recognized that Dutch courts may accord effect to foreign judgments short of that explicitly prohibited.[41] Under constructions that allow section 431 more limited coverage, such as that advanced by Meijers or that espoused in this article, the area left uncovered by section 431 is considerably larger. Under all theories, however, one problem, although of varying scope and therefore importance, remains the same: Where do Dutch courts find the rules that determine the effect to be granted to foreign judgments when section 431 is not applicable?

The first rules to which Dutch writers have turned for an answer to this question are those regulating proof. It is well recognized that a foreign judgment is an official document that has the probative force accorded to official documents by section 1905 of the Dutch Civil Code and therefore conclusively establishes all facts recorded by the maker of the document as having been witnessed by him personally.[42] Furthermore, foreign judgments may form the

pay due deference to Dutch public policy. See, *e.g.*, the excerpt cited in the text to note 34 *supra*. On the formula approved by the Supreme Court, see also text at notes 173-206 *infra*.

37. See text at notes 16-22 *supra*.

38. See text at notes 23-27 *supra*.

39. See *supra* note 31.

40. See text at notes 207-08 *infra*.

41. See especially the *Fur Coat* case, Hoge Raad, November 14, 1924, [1925] N.J. 91, and the *Hungarian Mortgage* case, Hoge Raad, April 1, 1938, [1938] N.J. No. 989.

42. On the probative effect of foreign judgments generally, see Kosters & Dubbink,

basis for inferences to be drawn by Dutch courts on the basis of section 1959 of the Dutch Civil Code.[43] For example, a Dutch court may draw from a foreign divorce decree containing a finding of adultery the inference that adultery was in fact committed. However, the drawing of this type of inference rests within the discretion of the court and is not compulsory.[44]

The Dutch rule of res judicata, conceptually rubricated as an irrebuttable presumption and embodied in section 1954 of the code, is also found in the Civil Code section on methods of proof.[45] An attempt to apply this rule to foreign judgments was repulsed by the Supreme Court at an early date.[46]

Apart from these provisions, there appear to be none that can be construed as regulating the effect to be given to foreign judgments. Nevertheless, although perhaps surprising to those who mistakenly believe that civil law courts tend to shun their law-creative function, this circumstance has proved of little concern to Dutch legal scholars. It is generally agreed that the absence of any directly applicable statutory direction does not discharge the court from the duty of evolving appropriate rules on the basis of general principles.[47] And the Dutch Supreme Court, in the *Swiss Child No. 2* and other cases, has specifically affirmed the power of the Dutch courts to grant extensive effect to foreign judgments in appropriate cases.[48]

This attitude renders inquiry into the policies determinative of the effect to be granted to foreign judgments a task of pre-eminent importance.

B. *Pertinent Policies*

Dutch scholars, unlike their American counterparts, have generally abstained from probing into the reasons that may motivate recognition of foreign judgments. This is the more remarkable since, under the rule formulated by the Supreme Court and in even larger measure under any of the other constructions given to section 431, it is clear that the effect to be accorded to foreign judgments must be determined by reference to appropriate policy considerations.

The principles bearing upon the recognition given to foreign judgments do not seem to be different in the Netherlands from those applied in the United

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Algemeen Deel 768-77 (1962). On the conclusive probative effect of foreign official documents, a category that includes foreign judgments, see Smit, International Co-Operation in Litigation: Europe 393 (1965).

43. See Kosters & Dubbink, Algemeen Deel 770 (1962).

44. *Ibid.* The example given in the text is merely an illustration of the virtually unlimited freedom Dutch courts enjoy in the drawing of inferences. This freedom tends greatly to diminish the practical significance of formal rules of evidence.

45. Burgerlijk Wetboek (Civil Code), Book IV.

46. See note 175 *infra* and accompanying text.

47. See 2 Meijers, Opstellen 322 (1955). *But see* Van Brakel, *op. cit. supra* note 32, at 110, who argues, with citation to supporting authorities, that Dutch courts may not grant conclusive effect to foreign judgments, because there is no statutory provision authorizing them to do so.

48. See cases cited in notes 176, 178, and 194 *infra* and accompanying text. The Supreme Court's explicit approval of decisions that granted conclusive effect to foreign judgments constitutes a most authoritative rejection of the view (referred to in note 47 *supra*) that is espoused by Van Brakel and others.

States. Since the various principles that have been advanced in explanation of the recognition granted to foreign judgments in the United States have recently been explored in some detail,[49] a brief recapitulation may suffice.

The recognition granted foreign judgments in the United States has variously been based on comity, sometimes identified with some concept of reciprocity, on the theory that a foreign judgment creates an enforceable obligation, and on the policies of res judicata.[50]

Comity, an opaque term that has served an endless variety of uses, has the superficial appeal of any shibbolethic explanation that is advanced in lieu of more penetrating analysis. The conclusion is inescapable, however, that reliance on comity as an explicatory rationale for the recognition to be given to foreign judgment must share the fate of all tautological reasoning. Comity, at least in this context, does not denote an obligation under international law. The denial of effect to foreign judgments by many of the world's nations bears telling testimony to the non-existence of an obligation under international law to grant foreign judgments recognition. Short of denoting a legal obligation, however, the term comity signifies little except perhaps some form of undefined and undefinable international goodwill or courtesy, surely too ambiguous and uncertain concepts for determining the precise measure of recognition to be accorded to foreign judgments.[51]

Reciprocity has also enjoyed the favor of those in search of an appropriate policy governing the recognition of foreign judgments.[52] Many nations recognize foreign judgments only on a basis of reciprocity,[53] and a rule of reciprocity was also embraced in *Hilton v. Guyot*,[54] the landmark case decided by the United States Supreme Court in 1895. A reasonably adequate discussion of the utility and desirability of reciprocity as a device for regulating international relations in general and international litigation in particular would clearly lead beyond the compass of this paper. It may suffice here to refer to more detailed treatments that unanimously reject reciprocity as a proper and useful principle.[55]

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49. See Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44, 52-56 (1962).

50. *Ibid.*

51. *Id.*, especially nn. 63-66.

52. For an enumeration of countries that have adopted a rule of reciprocity, see Riezler, Internationales Zivilprozessrecht § 56 (1949); Lorenzen, *The Enforcement of American Judgments Abroad*, 29 Yale L.J. 188, 199 (1919); Peterson, *Res Judicata and Foreign Judgments*, 24 Ohio St. L.J. 291, 307 n.83 (1963).

53. Importantly, Germany does so. *Zivilprozessordnung* § 328. England, although reciprocity was never required by its common law, introduced it by the Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 Geo. 5, c. 13. On this act, see Cheshire, Private International Law 603 (5th ed. 1957).

54. 159 U.S. 113 (1895).

55. On the undesirability of reciprocity requirements generally, see Smit, *International Co-Operation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity*, 9 Neth. Int'l L. Rev. 137, 147-49 (1962), and authorities cited. For a detailed treatment and excellently reasoned rejection of the principle of reciprocity as applied to the recognition of foreign judgments, see Süss, Die Anerkenning Ausländischer Urteiler, in Festgabe Rosenberg 229 (Munich 1949). See also Smit, *supra* note 49, at 49-50.

The only, and what would seem independently dispositive, argument against reliance on a principle of reciprocity to be repeated here is that it determines the effect to be given to a foreign judgment by reference to foreign rather than domestic principles. Clearly, the recognition granted to foreign judgments should reflect local policies and principles rather than those that happen to be pursued abroad.[56]

The theory of legal obligation finds its origin in England where it apparently continues to prevail. According to this theory, a foreign judgment is recognized because it creates an obligation that is suitable for local recognition and enforcement. Apart from the fact that foreign judgments may well not create independent obligations under the law of their origin, this theory is unsatisfactory because it fails to explain why the legal obligation, assuming it is created by the foreign judgment, should be recognized and enforced locally. Furthermore, the theory can explain neither whether and to what extent partial recognition may have to be given to foreign judgments, nor why the generally recognized exceptions to recognition, such as lack of jurisdiction under local concepts, are appropriate.[57] Although the legal obligation theory has been paid homage in some of the American cases, it seems fairly and properly abandoned in the more recent decisions.[58]

The proper and presently probably prevailing view is that the respect to be accorded to foreign judgments must be determined by reliance on res judicata policies.[59] The doctrine of res judicata serves various purposes. It protects a litigant from undue harassment resulting from repeated litigation over the same question; it protects the court against wasteful use of time and duplication of efforts occasioned by relitigation of a question that was already decided; and it promotes stability in legal relations.[60] Of these purposes, the first seems by far the most important. That the desire to protect the court is not an independently sufficient reason for applying the doctrine of res judicata is most forcefully demonstrated by the rule that the court may give res judicata effect to a judgment only upon request by one of the litigants.[61] Clearly, if the desire to save

56. Dutch authorities generally reject reciprocity as an appropriate criterion in this context. See, *e.g.*, Kosters & Dubbink, Algemeen Deel 831-32 (1962); Nysingh, Praeadvies N.J.V. 1929, at 48-49. *But see* Dierkes v. Bieseman, Arrondissements-Rechtbank Roermond, May 2, 1935, [1935] N.J. 1288.

57. See also Smit, *supra* note 49, at 54-55.

58. See cases cited by Smit, *supra* note 49, 54 n.74, 62 n.119. See also Peterson, *supra* note 52, at 291, 295 n.19 (1963).

59. See Peterson, *supra* note 52, at 300-02 (1963); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 784-85 (1950); Smit, *supra* note 49, at 56, 61-62.

60. See 5 Asser, Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht 306-08 (5th ed. by Anema & Verdam 1953).

61. This follows from the text of section 1954 of the Civil Code which explicitly speaks of invoking the res judicata effect of a prior judgment. See text at note 65 *infra*. The Supreme Court has also held invocation necessary; N.V. Centrale Suiker Maatschappij v. Van Poelje, Hoge Raad, June 30, 1932, [1932] N.J. at 1410.

The prevention of judicial harassment is also discounted as an important premise for the doctrine of res judicata by 5 Asser, *op. cit. supra* note 60, at 308.

the court's time or to promote certainty in legal relations constituted important rationalia, the court should have the power to apply the doctrine of res judicata on its own motion. It may be argued that, although protection of the court and certainty in legal relations are not independently significant reasons for applying the doctrine of res judicata, proper consideration for the courts and the stability of legal relations should at least play some part in determining whether relitigation of a previously adjudicated question should be permitted. It would seem, however, that, once it has been found that relitigation would not unduly harass the litigants, the desire to protect the court or to promote certainty in legal relations become factors of relatively little moment and can justify application of the doctrine only in special circumstances.[62]

The prevention of undue harassment of litigants through multiple litigation, the primary if not the only purpose of the doctrine of res judicata, is an appropriate goal not only when domestic but also when foreign judgments are involved. Therefore, under Dutch as under American law, the effect to be accorded foreign judgments should be determined by reference to the same policies of res judicata that determine the effect given to domestic judgments. Only these policies can provide a satisfactory rationale for whatever recognition is granted to foreign judgments. However, in determining whether relitigation would be unduly vexatious, proper account must be taken of the circumstance that the first litigation occurred before a foreign court and that, as the necessary result of differences in substantive and procedural laws, relitigation before a domestic court would normally not result in mere duplication of the foreign proceedings. This circumstance would, as a general proposition, seem to render res judicata policies in regard to foreign judgments less vigorous than those regulating the effect to be given to domestic judgments.[63] The implications of this difference are explored more fully below.[64]

62. See Smit, *supra* note 49, at 57-59. Stability and certainty in legal relations are more significant considerations in status matters, in which the prior determination may affect not only the parties, but the community at large. See text at notes 90-92 *infra*.

63. See Smit, *supra* note 49, at 61-62. Peterson, *supra* note 52, has argued that there are countervailing considerations that may add as much strength to the pertinent res judicata policies as the circumstance described in the text drains from them. Among these are what he calls the ordering principle and the policy of finality of American judgments that may be drawn into question abroad. The ordering principle is similar to that underlying the full faith and credit clause, namely that the giving of conclusive effect to foreign judgments will promote the functioning of the world community. The second policy is one of reciprocity in reverse. Granting that it would be improper to apply a reciprocity principle, but taking into account that other countries frequently do apply one, the finality policy is based on the notion that recognition of foreign judgments at home will promote recognition of domestic judgments abroad. See Peterson, *supra* note 59, at 305-08.

These arguments seem unpersuasive. The unifying purposes of a federal system such as that of the United States would be seriously frustrated by lack of recognition of judgments rendered in sister-states. Furthermore, the existence of the federal system itself makes it most likely that in the main the laws and the social, economic, and political conditions reflected in domestic judgments will not vary a great deal throughout the union; to an important extent, the federation itself, through its courts and otherwise, sees to it that state standards reasonably conform to the national pattern. All of these circumstances make what Peterson calls the ordering principle a viable force in a federal system. It is clear, however, that the world is far from being a unified system and that the laws and the social,

V. Dutch Res Judicata Rules

A. *Domestic Rules*

The domestic rule of res judicata is embodied in section 1954 of the Civil Code which reads as follows:

> 1. The authority of a judicial decision does not extend beyond the subject of the judgment.
>
> 2. To invoke this authority, it is required that the thing that is claimed be the same, that the claim be based on the same cause and be made by and against the same parties in the same relationship.

This provision, borrowed literally from the French Code,[65] seeems to require complete identity of parties and of claims for relief, including their factual and legal underpinnings, before permitting reliance on the prior judgment as res judicata. On its face, therefore, it appears to be considerably more limited than traditional American doctrines of res judicata and collateral estoppel.[66] By requiring complete identity of claims, section 1954 seems to exclude altogether application of a doctrine of collateral estoppel that would preclude relitigation of issues actually and necessarily litigated even though the cause of action pursued in the first action were different.[67] Furthermore, by stressing not only that the thing claimed must be the same, but also that the claims must be based on the same cause, section 1954 appears to preclude reliance on the prior judgment in order to bar relitigation of issues that could have been, but in fact were not, litigated in the prior action on the same cause of action.[68] To that extent,

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political, and economic conditions of the various nations vary greatly. Giving recognition to foreign judgements in order to promote a non-existing worldwide federal system would seem impractical, to say the least. It would also mean practicing idealism at the expense of individual litigants who are reasonably entitled to a full day in their own courts. There would seem to be a place for the ordering principle as soon as, but not before, some reasonable federal order of the world or part thereof has been established.

As to the policy of finality, giving any consideration to principles of reciprocity, whether they operate directly or in reverse, seems most undesirable. Whether domestic courts should give recognition to foreign principles should be determined on the basis of domestic principles of fairness, and not on the basis of principles of reciprocity that may unfairly be applied by foreign courts. See text at notes 55-56 *supra*. Furthermore, as a single example may illustrate, the policy of finality, like all reciprocity principles, is unlikely to have the desired effect. When, after the 1906 earthquake in San Francisco, it appeared that many interests had been insured by German insurance companies, California amended its statutes to provide for the broadest possible recognition of foreign judgments. See Cal. Code Civ. Proc. § 1915. Nevertheless, the German Reichsgericht held that in regard to California judgments the requirement of reciprocity of *Zivilprozessordnung* § 328 was not met and therefore held improper recognition of a California judgment rendered against a German insurance company. C.u.U. v. Rh. & M. Feuerversicherungsgesellschaft, Reichsgericht (VII. Zivilsenat), 70 Entscheidungen des Reichsgerichts 434 (1909). See also Süss, *supra* note 55, at 239-40.

64. See text at notes 85-102 *infra*.

65. Code Civil § 1351. A literal English translation of the French Code Civil provision can also be found in La. Civ. Code Ann. art. 2286 (West 1952).

66. For a concise exposition of American rules, see Restatement, Judgments §§ 45-72 (1942). See also Smit, *supra* note 49, at 56-57.

67. In its traditional formulation, the doctrine of collateral estoppel recognized by American courts precludes relitigation of such issues. See Restatement, Judgments § 68 (1942). On the actual interpretation given § 1954 by the courts, see text at notes 70-75 *infra*.

68. See 5 Asser, *op. cit. supra* note 60, at 359-60.

even when the causes of action are the same, the Dutch rule of res judicata appears narrower than the corresponding American rule which, in the case of identity of causes of action, precludes relitigation both of issues that were and of issues that could have been litigated.[69]

However, although section 1954, on its face, requires that the claims for relief propounded be the same, the Supreme Court has given it a more liberal interpretation. In *Van Suchtelen van de Haere v. N. V. Nationaal Scheepsverband*,[70] the plaintiff sought recovery of installments due under a loan agreement of which the defendant had guaranteed repayment. The defendant invoked as a defense the binding effect of a prior judgment rendered in an action between the same parties in which the plaintiff's claim for recovery of an earlier installment had been rejected on the ground that the guarantee had lapsed. The Court of Appeal rejected the plea of res judicata, because the first and second action concerned different installments and the things claimed were therefore not the same. The Supreme Court reversed. It held that, by requiring that the thing claimed be the same, section 1954 did not demand complete identity of the remedies sought, but merely that the dispute laid before the court in both actions be the same. Finding that in the case presented the question of whether the guarantee had lapsed was dispositive of both actions, it held the requirements of section 1954 met and the plea of res judicata well-founded.

The Supreme Court adhered to this interpretation in subsequent cases. In *Van Praagh v. Van Daelen*,[71] plaintiff sought payment of installments due under a lease agreement. The defendant interposed a plea of res judicata based on a prior judgment between the same parties in which a claim for eviction based on the same lease had been denied on the ground that the defendant was not a party to the lease. The Supreme Court upheld the plea, noting that the single question of whether the defendant was a party to the lease was decisive of both actions.

A similar result was reached in *Moron v. Suriname*,[72] in which the Supreme Court stressed that the dispute laid before the court must be all-governing in both actions. In this case, the heirs of a decedent claimed compensation from Surinam for real estate taken in condemnation proceedings. The defendant admitted all of plaintiffs' allegations, but denied that they were entitled to the assets of the estate. The plaintiffs invoked as res judicata a judgment rendered in an action between the defendant and the plaintiffs' predecessors in interest. In that action, in which recovery had been sought of an indemnity due by Surinam upon the release from slavery of slaves that had belonged to the decedent's estate, the court, contrary to Surinam's contention, had decided

69. Cromwell v. County of Sac, 94 U.S. 351 (1876). But the Dutch result would apparently be reached under La. Civ. Code Ann. art. 2286 (West 1952). See Quarles v. Lewis, 226 La. 76, 75 So. 2d 14 (1954).

70. [1916] N.J. 859, Weekblad van het Recht [hereinafter W.] No. 10026.

71. [1926] N.J. 1061.

72. [1927] N.J. 1426. This case was decided under the parallel provisions of the then Surinam Civil Code.

that plaintiffs' predecessors in interest were entitled to the assets of the estate. The Supreme Court held the plea valid. It noted that, although the prior action concerned a different part of the estate, "in both actions the all-governing point in dispute" was whether the testamentary disposition made by the decedent on behalf of plaintiff's predecessors in interest gave her a right to the assets of the estate or only to its income.[73]

These decisions have raised the question of how far the Supreme Court intended to depart from the language of section 1954. Both Meijers and Scholten have assumed that the Supreme Court gave its sanction to granting res judicata effect to all issues necessarily decided in the prior action.[74] However, the Supreme Court's decisions do not warrant so broad a conclusion. In all of these cases, the Supreme Court found and stressed that there was only one "all-governing point in dispute" that by itself was dispositive of both actions. They therefore justify no conclusion as to the result to be reached when res judicata effect is sought for a judicial resolution of an issue that is not the only one raised.[75]

In such a case, various possibilities may present themselves. First, the issue that is by itself dispositive of the first action may resolve only one of the issues raised in the second action. Second, one of the issues in the first action may be the only issue raised in the second action. And third, both in the first and in the second action the issue as to which res judicata effect is sought may be only one of more issues raised. Whether in any of these cases, res judicata effect may be given in the second action to the judicial determination made in the first depends in essence on whether it is reasonable to expose the objecting party to relitigation of the issue. This depends in turn on whether the opportunity and interest of this party to litigate this issue in the first action were reasonably the same as those existing at the time of the second action. For the greater the difference between his opportunity to litigate the issue or his interest in litigating it, the more attenuated would be the reasonableness of holding him precluded by the first determination.

As a general proposition, it would seem that the Supreme Court's decisions take only the smallest possible step away from a requirement of complete identity of claims for relief. The next step would be the granting of conclusive effect to the determination of a dispute that is "all-governing" in the first, but not in the second, action. In that situation, it would still be reasonably likely that the opportunity and interest to litigate the dispute were not less significant in the

73. [1927] N.J. at 1428.

74. Meijers, in annotations on the first and the third of the decisions summarized in the text, in 47 W.P.N.R. No. 2453 (1916) and [1927] N.J. 1428-29; Scholten, in an annotation on the second decision in [1926] N.J. 1064-65.

75. Significantly, the explanatory memorandum on a proposal to revise Dutch rules of evidence prepared by the Standing Committee on Netherlands Civil Legislation states that the Supreme Court case law requires that the "all-governing question in dispute" be the same in both actions. Staatscommissie voor de Nederlandse Burgerlijke Wetgeving, Bewijsrecht-Ontwerp van Wet met Memorie van Toelichting 42 (1959).

first than they were in the second action.[76] However, in all other cases, it would seem most difficult to indulge in generalizing assumptions about the equivalence of the opportunity and interest to litigate the particular question involved. All that could perhaps safely be said about these cases would be that the granting of conclusive effect would be least acceptable if the issues involved were "all-governing" neither in the first nor in the second action[77]—the situation in which in the United States the doctrine of collateral estoppel traditionally finds application.[78]

The decisions of the Dutch Supreme Court have never gone beyond granting conclusive effect to the judicial determination of a dispute that was all-governing in both actions.[79] Furthermore, the Supreme Court has consistently held that res judicata effect cannot attach unless both the factual and the legal components of the dispute are exactly the same in both actions.[80]

The Supreme Court's interpretation has not remained without its detractors. Authoritative commentators and some of the lower courts incline to the view that the requirement that the dispute be "all-governing" should be relinquished and that conclusive effect should be given to the judicial resolution of any issue material in both actions.[81] None of the proponents of this view really endeavor to argue its propriety in the light of pertinent policy considerations. Rather, it seems to be based on the not always fully articulated assumption that it is not unreasonable to hold a litigant bound by a determination that has once gone against him. It would seem, however, that this assumption should give way to more differentiating inquiry. The reasonableness of holding a litigant bound by a prior determination must be evaluated in terms of his opportunity and interest to litigate the dispute in the context of both actions. Furthermore, the nature of the litigation that led to the determination also plays a role.

In the Netherlands, as a rule, litigation is far less costly and complicated than in the United States. Pre-trial discovery and trials in the American sense, involving lengthy presentations of evidence, are unknown. Documentary evi-

76. Since the issue was "all-governing" in the first action, it seems likely that the opportunity and interest to litigate it was at least as significant in the first as in the second action. Furthermore, the all-embracing nature of the dispute in the first action makes it probable that the litigants foresaw its relevance to the second action. *Cf.* Smit, *supra* note 49, at 69 n.150.

77. Because in that situation it is most probable that the opportunity and the interest to litigate the issue were different in the first action from what they are in the second. When one of the issues decided in the first action is "all-governing" in the second, it is more likely that the litigants in the first action foresaw the relevance of the issue in the subsequent context and that this influenced their interest in litigating it than when the issue was only one of several in both actions.

78. Restatement, Judgments § 68 (1942).

79. See Viaene v. Van der Kloet, Hoge Raad, April 6, 1951, [1952] N.J. No. 28; Houtappel v. Velthuyzen, Hoge Raad, Febr. 15, 1963, [1963] N.J. No. 423. The same conclusion was reached by an American court. See Bata v. Hill, 163 A.2d 493, 508 (Del. 1960).

80. See Turksma v. O.O.M., Hoge Raad, May 30, 1952, [1953] N.J. No. 406; F.L. v. G.B., Hoge Raad, Sept. 18, 1959, [1959] N.J. No. 564; Riton v. Blitz, Hoge Raad, Febr. 15, 1963, [1963] N.J. No. 344.

81. 5 Asser, *op. cit. supra* note 60, at 347-60, and cases cited. See further authorities cited *supra* note 74.

dence is submitted either with the pleadings or at the oral argument, and oral evidence is taken only pursuant to court order at special court sessions that are ordinarily quite brief. The pleadings and the oral arguments are in a real sense the backbone of the litigation. Lawyers' fees are on the whole moderate, and legal aid is liberally available.[82] As a result, permitting a litigant to relitigate a particular issue ordinarily imposes less considerable burdens on his opponent in a court in the Netherlands than it would in the United States. In the light of these circumstances, the Dutch Supreme Court's reluctance to give the doctrine of res judicata as wide a scope as it has in the United States seems quite understandable. Indeed, in view of the generally attenuated fairness of holding a litigant precluded by a determination made in a different context and the lesser measure of harassment resulting from relitigation of a dispute decided in the Netherlands, the rule formulated by the Supreme Court appears properly to reflect pertinent policy considerations.[83] In any event, if any further broadening of the doctrine of res judicata were considered desirable, persuasive arguments could be adduced in favor of not extending the applicability of the doctrine beyond a situation in which the prior determination to which conclusive effect is to be given resolved the entire dispute that constituted the subject matter of the first action.[84]

B. *International Rules*

Since the policies underlying the doctrine of res judicata provide the only adequate reasons for granting recognition to foreign judgments,[85] domestic rules of res judicata form the logical starting point for the development of international rules. However, domestic rules cannot, without more, be applied to foreign judgments. Due account must be taken of the circumstance that domestic relitigation will normally not be exact duplication of the litigation abroad and that, if only because of the different procedural and substantive laws and conditions prevailing at the foreign forum generally, the opportunity to litigate a particular dispute will ordinarily be different from that afforded in the Dutch court. Re-evaluation of domestic rules in the light of this circumstance is therefore required.

Dutch rules of domestic res judicata presuppose that the first determination was made with proper regard to requirements of due process. Ordinarily, a Dutch judgment, once rendered, cannot be attacked collaterally.[86] However, a similar supposition is not warranted with respect to foreign judgments. There-

82. The necessity of making this summary brief accounts for its inadequacy. For a reasonably concise treatment of Dutch civil procedure, see Coops, Grondtrekken van het Nederlands Burgerlijk Procesrecht (7th ed. by Westerouen van Meeteren 1957).

83. It is therefore most appropriate that the proposed new rules of evidence adopt it legislatively. See note 75 *supra*.

84. See *supra* note 76 and accompanying text; Smit, *supra* note 49, at 69 n.150.

85. See text at notes 59-64 *supra*.

86. This is the general rule in Europe, which is often expressed by the phrase "voies de nullité n'ont lieu contre les jugements." See Coops, *op. cit. supra* note 82, at 145; *cf.* Devèze, De la règle: Voies de nullité n'ont lieu contre les jugements (1938).

fore, the first question to be posed is whether the nature of the foreign proceedings was such that the resulting judgment can be accorded any effect without violating basic standards of fair procedure. If not, granting any recognition to the foreign judgment would clearly be unreasonable.[87] It is only after the foreign judgment has passed this initial test that the problem arises of determining the precise extent of the effect to be accorded to it.

Since the policies underlying the doctrine of res judicata are of diluted strength when applied to foreign judgments, it would seem proper never to give foreign judgments conclusive effect that is more extensive than that granted to domestic judgments. Accordingly, when recognition is sought for a foreign judgment, the binding effect accorded to it should be determined by the relatively narrow Dutch rules of res judicata rather than by the rules that may prevail at the foreign forum.[88]

The same reasoning also supports the view that foreign judgments should not be given more extensive effect than they have in the country of their origin, for it would be unreasonable to accord recognition that is denied by the forum of the judgment's origin.[89]

However, definition of the affirmative effect to be given to foreign judgments is more difficult. The reasonableness of holding a foreign determination conclusive in domestic litigation would seem to depend at least in part on the nature of the foreign proceedings. If the foreign proceedings determined a personal status or the interest in a thing, and the foreign court had jurisdiction under Dutch concepts, it would normally seem reasonable to hold the foreign determination binding. In matters of status, certainty and stability are important goals and relitigation of disputes once decided becomes quickly vexatious.[90] If the foreign court merely determined the interest in a thing over which it had jurisdiction, the conclusive effect given to this determination would be appropriately limited to the thing.[91] In both these cases, if the foreign court

87. This, of course, is the proper approach under American law and, specifically, the due process clause. See Smit, *supra* note 49, at 50-52. It is also generally accepted as proper under Dutch law. See Kosters & Dubbink, Algemeen Deel 826-32 (1962); notes 103-57 *infra*.

88. For an exposition of these rules, see text at notes 65-84 *supra*. Application of the rule stated in the text would lead to the result that, for example, an issue actually litigated and necessarily determined by an American judgment could be held conclusively resolved in Dutch litigation only if it were "all-governing" in both actions. The fact that under the American law of collateral estoppel a different result would be reached would be irrelevant.

89. On this qualification, see also Smit, *supra* note 49, at 63 n.126.

90. See *supra* note 62. See also Smit, *supra* note 49, at 64-66.

91. This is well-settled in the United States. Restatement, Judgments §§ 73, 75 (1942). It is, of course, possible that the foreign judgment does not limit itself to making a determination of the interests in the thing subject to the court's jurisdiction. This is likely especially in countries, such as Sweden and Italy, that are not familiar with the concepts of in rem and quasi-in-rem judgments evolved under American law. See Ginsburg & Bruzelius, Civil Procedure in Sweden 4.03.b (Smit ed. 1965); Cappelletti & Perillo, Civil Procedure in Italy 4.03.b (Smit ed. 1965). The unfamiliarity with concepts of in rem or quasi-in-rem jurisdiction should not stand in the way of proper application of the rule, however. All that the Dutch court will have to do is to refuse recognition to the foreign judgment insofar as it goes beyond determining an interest in the thing before it.

had the power to proceed, the granting of conclusive effect would serve the policies of res judicata and not unfairly prejudice the litigant who lost abroad.[92]

The common law distinctions between judgments in rem, quasi-in-rem, and in personam are not generally known in the Netherlands.[93] The Code of Civil Procedure does distinguish between real and personal actions,[94] but this distinction, although significant primarily in determining the subject matter competence of Dutch courts,[95] has not been considered to have a bearing on the res judicata effect of Dutch judgments. Although the distinction between status and in rem judgments, on the one hand, and in personam judgments, on the other, is not part of familiar Dutch legal terminology, its use in this context should create no difficulties. The terms denote only functional concepts, and for the purpose of applying the rules here formulated the only pertinent inquiry is whether the foreign judgment, irrespective of what labels the foreign court may have affixed to it, purports to determine a status or interest in a thing properly before the court.[96]

An important characteristic of in personam judments is that they purport to bind the judgment debtor personally with respect to all his assets wherever located.[97] Rather than determine, with in rem or quasi-in-rem effect, the interest in a thing, they create or affirm a personal obligation resting on the judgment debtor. Recognition of foreign judgments of this nature carries their effect far beyond the consequences that can be attached to them by the forum of their origin. At the forum of its origin, the judgment can be enforced only to the extent permitted by assets available there. Recognition in a foreign country extends the effect of the judgment to assets the judgment debtor may have in the foreign country and therefore goes far beyond merely affirming, as in the case of status or in rem judgments, consequences attached by the forum of origin.[98]

It is this characteristic that would seem to make it inappropriate blandly to give conclusive effect to all foreign in personam judgments. Instead, an attempt must be made to determine the circumstances in which it is reasonable for a foreign court to render a determination that is binding on the judgment debtor with respect to all of his assets wherever located. It would seem that this requirement of reasonableness is met in only two cases: first, when the judgment debtor was the litigant who voluntarily selected the foreign forum; and

92. See Smit, *supra* note 49, at 64-67.

93. In this respect, Dutch law is similar to European laws generally. See authorities cited in note 91 *supra*. For definitions of in rem, quasi-in-rem, and in personam judgments, see Restatement, Judgments, Introductory Note 5-9 (1942).

94. Code of Civil Procedure §§ 126, 128. For definitions, see Code of Civil Procedure § 129.

95. For a discussion of these rules, see Star Busmann, Hoofdstukken van Burgerlijke Rechtsvordering, Nos. 150-56 (2d ed. 1955). Section 126(8) and (9) of the Code of Civil Procedure, prescribing that claims relating to real estate must be brought before the court of its location, contains an exception.

96. See *supra* note 91.

97. Restatement, Judgments, Introductory Note 5-9 (1942).

98. See Smit, *supra* note 49, at 67-69.

second, when the judgment debtor was substantially related to the foreign forum at the time the proceedings were commenced.

Granting binding effect to a foreign judgment that was rendered by a court selected by the litigant against whom it is invoked is reasonable because it is only fair to let a litigant bear the consequences of his own choice.[99]

The notion underlying the second criterion for holding a foreign determination binding is that a litigant should be bound by the determinations made by his own community.[100] What the technical legal nature of the litigant's relationship to the community must be is difficult to define. Traditionally, especially in Europe, membership in a community has been defined in terms of nationality.[101] However, in present times, in which nationals of one country frequently enjoy the privileges of real membership in foreign communities, domicile, since it normally requires actual participation in the life of the foreign community, is a more appropriate criterion.[102]

After this brief consideration of res judicata policies as applied to foreign judgments, more particular inquiry into the present status of the law would seem opportune. This inquiry will also serve the purpose of attempted integration of pertinent policies into the statutory scheme of section 431 of the Code of Civil Procedure.

VI. Rules Regulating the Recognition of Foreign Judgments

A. *Introduction*

The principal purpose of this article is to articulate pertinent policies rather than to discuss technical rules. However, a reasonably comprehensive treatment of the circumstances in which recognition is granted to foreign judgments in the Netherlands must deal not only with the circumstances that determine to what extent such recognition is appropriate, but also with the prerequisites that must be met before any recognition may be given.

B. *Prerequisites to Recognition*

1. *No conflict with public policy.* It is well-settled that no recognition may be granted to foreign judgments if Dutch public policy would be violated as a result. Although the general principle is well-established, it is not always

99. This seems almost universally accepted. See Hilton v. Guyot, 159 U.S. 113, 170 (1895) (dictum) and other authorities cited by Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.A.L. Rev. 69, n.149 (1962). For Dutch authorities to the same effect, see note 178, 217-20 *infra*.

100. This thought is by no means new. It was very much in the mind of the legislature when it adopted the original version of § 431. See *supra* note 19. Other authorities that recognize this criterion to be insignificant include 1 Boullenois, Traité de la Personnalité et de la Réalité des Lois 601-50 (1766); Schibsby v. Westenholz, L.R. 6 Q.B. 155 (1870); Hilton v. Guyot, 159 U.S. 113, 170 (1895); Story, Conflict of Laws § 613 (8th ed. 1883).

101. See Blackstone, Praeadvies N.J.V. 1947, at 81; Kosters & Dubbink, Algemeen Deel 580-85 (1962).

102. See Smit, *supra* note 99, at 67-68. On the respective advantages and disadvantages of domicile and nationality as criteria of reference in the conflict of laws generally, see authorities cited note 101 *supra*.

clear how far the role of public policy extends.[103] Public policy is an encompassing term that embraces all elements that disqualify a foreign judgment for recognition. In the absence of a due process clause of constitutional stature,[104] it includes all requirements, such as those relating to jurisdiction, proper notice, and adequate opportunity to be heard, that in the United States are regarded as requirements of procedural due process. In addition, it provides a catch-all formula for denying recognition to foreign judgments in all cases in which recognition would be unpalatable for other reasons.

The public policy exception is generally regarded as having a broad range. As the following discussion of more specific objections to foreign judgments grounded in public policy may show, application of the exception has not been limited to circumstances in which recognition would "shock the conscience" or be "against natural justice,"[105] but has been extended to all cases in which recognition would have adversely affected a viable Dutch public interest.

a. *A civilized system of procedure.* Although all writers agree that the foreign court must have proceeded under a civilized system of procedure,[106] no case has been found refusing recognition to a foreign judgment on the ground that the foreign procedure was not civilized. Nor is it probable that a Dutch court will in the future issue a broadside of this nature against a foreign procedural system.[107] Dutch courts are far more likely to concentrate their attention upon particular elements of the foreign procedure found to be wanting under domestic concepts of fair procedure. Accordingly, discussion of the particular respects in which foreign procedure may be found defective is more helpful than an effort to determine the general characteristics of uncivilized systems of procedure.

b. *Jurisdiction.* Dutch scholars are agreed that recognition of any foreign judgment must be predicated upon the foreign court's having had the power to proceed against the defendant.[108] This power may be called jurisdiction, as long as it is realized that in the Netherlands it cannot be defined by resort to either constitutional prescriptions or provisions defining the competence of

103. See Kosters & Dubbink, Algemeen Deel 826-32 (1962). The Supreme Court has always made the reservation that no effect may be given to a foreign judgment in violation of Dutch public policy. See cases cited in notes 34 and 36 *supra.*

104. The Dutch Constitution, following the generally prevailing pattern in Europe, does not contain such a clause.

105. These are the terms likely to be encountered in common law sources. See authorities cited by Smit, *supra* note 99, at 52 nn.51-53.

106. See, *e.g.*, Kosters & Dubbink, Algemeen Deel 830 (1902); Van Brakel, Grondslagen en Beginselen van Nederlandsch Internationaal Privaatrecht, § 92 (1946).

107. Now that modern means of communication and transportation have brought even the most distant countries so much closer and judges all over the world, within the framework of such organizations as the World Association of Judges, are meeting with so much greater frequency, it is most unlikely that any judge will levy such a broad accusation at the procedure followed in a court manned by his brethren.

108. See, *e.g.*, Kosters & Dubbink, Algemeen Deel 815-25 (1962); Van Brakel, *op. cit. supra* note 106, § 91, and cases and authorities cited.

Dutch courts.[109] Rather, it must be defined on the basis of general principles circumscribing the permissable extent of judicial power.

The cases have provided little opportunity for Dutch courts to evolve proper rules defining the limits of foreign judicial jurisdiction. Nor have the commentators given this branch of the law the benefit of detailed analysis. However, leading commentators agree that foreign jurisdiction is not necessarily defined by the same rules that regulate the competence of Dutch courts and may rest on bases that are not recognized as bases of competence for Dutch courts.[110] For example, a leading commentator accepts as a proper basis of foreign jurisdiction the rule of section 420 of the French Code de Procédure Civile, which gives in personam competence to French commercial courts of the place at which an obligation has been contracted and the goods are to be delivered or at which payment is to be made.[111] Another example of a rule providing a proper basis for jurisdiction mentioned is section 32 of the German Zivilprozessordnung which gives in personam competence to German courts of the place at which the defendant committed a tort.[112] Although there are no equivalent Dutch rules that would give Dutch courts competence in these circumstances, it is argued that they should nevertheless be considered as providing a reasonable basis for the exercise of jurisdiction.[113]

This approach seems the proper one. The reason for requiring that the foreign court have jurisdiction is to ensure that the foreign court proceeded on a reasonable basis. It is clear that Dutch law has no monopoly in the formulation of proper bases for the exercise of judicial power. As long as the foreign basis is reasonable, it should be recognized as proper.[114] Of course, the require-

109. There are no applicable consitutional provisions, and rules of internal competence are addressed to a different problem. See also text at notes 134-35 *infra*. Use of the term jurisdiction is appropriate in this context, because the power of the foreign court is determined by reference to an outside body of law, *i.e.*, in this case, Dutch law. See Smit, *The Terms Jurisdiction and Competence in Comparative Law*, 10 Am. J. Comp. L. 164 (1961). Alternatively, since the distinction between jurisdiction and competence will not readily be apparent to European lawyers, the term adjudicatory authority may be used. *Cf.* Ginsburg & Bruzelius, Civil Procedure in Sweden c. 4 (1965).

110. Kosters & Dubbink, Algemeen Deel 818 (1962); Van Brakel, *op. cit. supra* note 106, § 91, at 126 (suggesting that these rules should be formulated under international law).

111. Kosters & Dubbink, Algemeen Deel 819 (1962). On § 420, see also Herzog, Civil Procedure in France 4.23.a (Smit ed. 1966).

112. Kosters & Dubbink, Algemeen Deel 819 (1962).

113. *Id.*, at 818.

114. Kosters & Dubbink, Algemeen Deel 818 (1962), reaches the conclusion that the jurisdiction of the foreign court should be determined by reference to the foreign law and cites lower case law purportedly supporting this conclusion. Van Brakel, *op. cit. supra* note 106, § 91, at 126, rejects this view on the ground that there is no reason for Dutch courts to see to the observance of foreign provisions on this subject. Hijmans, Praeadvies N.J.V. 1929, at 44-51, after having enumerated the various views encountered in the literature, seems to go in the direction of Kosters & Dubbink. Nysingh, Praeadvies N.J.V. 1929, at 44-47, comes to the conclusion that the operative rules must be formulated independently of the foreign and domestic rules of internal competence. See further the authorities cited by these authors.

Nysingh's approach is clearly correct. Probably, most writers have been reluctant to endorse it because no ready-made rules under which to test the foreign court's jurisdiction seemed available. It is in this connection that the comparative approach can do excellent

ments to be imposed in this context are closely related to the substantive rules on recognition. If foreign judgments are freely given conclusive effect, restrictive rules of jurisdiction may provide an escape from undesirable liberality in granting recognition. However, rules of jurisdiction should not serve the function of providing palliatives against too liberal rules on recognition. The question of what recognition should be accorded to foreign judgments should be faced squarely rather than be approached indirectly through rules of jurisdiction.[115]

It is difficult, if not impossible, to give an exhaustive enumeration of all bases of jurisdiction that are reasonable. Moreover, under the substantive rules of recognition proposed here, this question is of little significance. Under these rules, the only foreign judgments qualifying for recognition are those rendered against domiciliaries of, or against those who selected, the foreign forum.[116] In these cases, since consent and domicile are undoubtedly proper bases of jurisdiction, the foreign court's jurisdiction is unlikely to be challenged.[117]

However, if more liberal recognition were to be granted to foreign judgments, the determination of proper bases of jurisdiction would considerably gain in importance.[118] As indicated, consent and domicile would seem to constitute clearly acceptable bases of jurisdiction. A more difficult problem is raised when the foreign court's jurisdiction is based on presence, the traditional common law basis for both jurisdiction and competence.[119]

Whether this problem is likely to become pressing depends in large measure on how the foreign court's jurisdiction is determined. If Dutch courts were to determine the presence of a sufficient basis of jurisdiction by reference merely to the foreign competence rule, this problem would be raised squarely in each case in which a common law judgment is formally based on the presence of the de-

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service. The American learning developed as to proper bases of jurisdiction is clearly susceptible of direct application in the Dutch context. Since the Dutch law is to be developed on the basis of general principles rather than a statutory provision, the transplantation can be effectuated without encountering legislative impediments. See also text at notes 47-48 *supra*. For American elaborations on the rule that a court has jurisdiction if its exercise of adjudicatory power is reasonable in view of the relationship of the defendant to the forum, see Restatement (Second), Conflicts of Law §§ 74, 77-93 (Tent. Drafts Nos. 3 and 4, 1956-57). Smit, *supra* note 99, at 50-51.

115. See also text at notes 230-33 *infra*.

116. See text at notes 219-29 *infra*.

117. The rule that defendants may be sued before their domicile has universal appeal. See Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 Am. J. Comp. L. 323, 328-30 (1961). It was specifically approved in the United States in Milliken v. Meyer, 311 U.S. 457 (1940). That consent is a proper basis for jurisdiction is equally well-settled. In the Netherlands, the *Fur Coat* case constitutes undoubtedly the best illustration. See note 178 *infra* and accompanying text. In the United States, consent is the primary common law basis of jurisdiction. See Restatement (Second), Conflict of Laws §§ 77, 81 (Tent. Draft No. 3, 1956).

118. As international intercourse intensifies, the view that foreign judgments should generally be granted recognition is likely to gain additional adherents. Already Nysingh, Praeadvies N.J.V. 1929, at 69, favored the giving of conclusive effect to foreign judgments generally. Thus far, the Supreme Court's interpretation of § 431 of the Code of Civil Procedure has prevented acceptance of this view. See text at notes 173-95 *infra*.

119. See Restatement (Second), Conflict of Laws §§ 77-78 (Tent. Draft No. 3, 1956).

fendant at the foreign forum at the time of service.[120] However, if Dutch courts were to disregard the foreign competence rule for this purpose and were to determine the sufficiency of the foreign court's jurisdiction on the basis of all relevant circumstances, the case in which the foreign court's jurisdiction could be said to rest merely on the defendant's presence at the foreign forum at the time of service would probably be rare and of correspondingly little importance.[121] For in most cases in which the formal competence of a common law court is based on the defendant's presence at the forum, there are many additional circumstances that make the exercise of judicial power reasonable.[122]

Testing the foreign court's jurisdiction on the basis of all relevant circumstances rather than merely by reference to the foreign rule of competence has a dual advantage. First, it avoids the necessity of getting Dutch courts involved in what may be difficult problems of determining the foreign rules of judicial competence; second, it is in line with the basic reason for inquiring into the foreign court's power for the Dutch court to evaluate the propriety of the foreign court's proceedings on the basis of the actual facts rather than the technical rules that may appeal to the foreign legislature. In view of these advantages, it would seem the rule most deserving of application by Dutch courts.[123]

Although acceptance of this rule would greatly decrease the practical importance of whether presence is a sufficient basis of jurisdiction, it would not eliminate it altogether. In the exceptional case, it would still have to be faced. Notwithstanding the hoary common law tradition of accepting mere presence as a sufficient basis for jurisdiction, arguments grounded in notions of substantial fairness dictate its rejection. The mere circumstance that a defendant was served within the state may have been regarded as sufficient in times in which the court's ability to subject the defendant to its physical powers was considered good enough reason for its doing so. At present, the reasonableness of subjecting the defendant to the court's powers must be judged in the light of the totality of his relations to the forum. In that context, a fleeting presence is not enough.[124]

120. The common law rule of competence generally prevailing in the United States is that in personam competence is created by personal service of the defendant within the territorial verge of the court. See Cheatham, Griswold, Reese & Rosenberg, Conflict of Laws 111 (5th ed. 1964).

121. The plaintiff who initiates litigation will ordinarily do so in the hope of eventually obtaining satisfaction of his judgment. If the defendant's only contact with the forum is his temporary presence there and satisfaction of the judgment to be rendered will have to be obtained abroad, the plaintiff will ordinarily think twice before commencing the proceedings.

122. To that extent, Ehrenzweig's attack on the concept of transient jurisdiction stirs up a storm in a teacup. See Ehrenzweig, *Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956). On Ehrenzweig's criticism of the traditional common law rule, see also Schlesinger, *Methods of Progress in Conflict of Laws—Some Comments on Ehrenzweig's Treatment of "Transient" Jurisdiction*, 9 J. Pub. L. 313, 316 (1960).

123. The same solution has been advocated under American law. See Smit, *supra* note 99, at 51 n.48.

124. See Ehrenzweig, *supra* note 122.

Meriting recognition by Dutch courts as properly creating jurisdiction are the usual forms of the so-called single act rules that have been adopted in the last ten years in the United States[125] and even earlier in Europe.[126] These enactments typically give a court power to adjudicate controversies arising from acts or ownership of property within the state.[127] They are of limited scope, since they permit only the adjudication of claims arising from the acts, and, except for an occasional long-nailed application,[128] remain within the boundaries of a reasonable exercise of judicial power.

The same cannot be said of what are frequently called rules of extraordinary or exorbitant competence found in Belgian, Dutch, French, German, Swedish and probably many other legal systems.[129] Reference is here made to such provisions as section 53 of the Belgian Law of March 25, 1876, which gives competence to Belgian courts if the plaintiff is domiciled in Belgium; section 126(3) of the Dutch Code of Civil Procedure which permits a Dutch domiciliary or resident to sue before the Dutch courts a defendant who has neither a domicile nor a residence in Holland; section 14 of the Civil Code which renders French courts competent to adjudicate controversies in which the plaintiff is a Frenchman; section 23 of the German *Zivilprozessordnung*, which authorizes German courts to pronounce in personam judgments against defendants who are neither domiciled nor resident in Germany, as long as they have some assets in Germany;[130] and section 10:3(1) of the Swedish *Rättegångsbalk* which contains a similar provision.[131] All of these rules suffer from the common defect that they permit the exercise of competence over a defendant without requiring that the defendant stand in a relationship to the forum that makes it reasonable that it assert judicial power over him. And this is true not only of the Belgian, Dutch, and French provisions, but also of the German and Swedish provisions which fail to limit the court's power to making a determination of the interest in the assets within the

125. For typical examples, see Uniform Interstate and International Procedure Act art. I, 9B U.L.A. (Supp. 1966); N.Y. CPLR § 302.

126. See Ginsburg & Bruzelius, Civil Procedure in Sweden 4.45 (Smit ed. 1965). Cappelletti & Perillo, Civil Procedure in Italy 4.05.f (Smit ed. 1965); Weser, *supra* note 117, at 331-32. See also text at notes 129-33 *infra*.

127. See, *e.g.*, N.Y. CPLR § 302.

128. On long-fingered constructions of long-arm statutes, see Cheatham, Griswold, Reese & Rosenberg, Conflict of Laws 159 (5th ed. 1964). For an example of a rejection of a long-nailed interpretation, see, *e.g.*, Feathers v. McLucas, 15 N.Y.2d 443 (1965).

129. On these rules, see Ginsburg & Bruzelius, Civil Procedure in Sweden 4.24.b (Smit ed. 1965); Weser, note 117 *supra*, at 324-28.

130. This provision is considered by Kosters & Dubbink, Algemeen Deel 819 (1962), to create a reasonable basis of jurisdiction on the ground that Dutch law has an equivalent rule embodied in sections 764-67 of the Code of Civil Procedure. The latter sections permit attachment of assets belonging to a debtor who has no known domicile in Holland and cognizance of the claim to validate the attachment by the court of the location of the assets. This argument should be rejected for two reasons. First, rules of internal competence are not designed to resolve problems of jurisdiction. See text at notes 134-35 *infra*. Second, the Dutch rule seems designed to permit merely application of the proceeds of the assets toward satisfaction of the claim and therefore resembles to a much greater extent an instance of reasonable exercise of quasi-in-rem jurisdiction. See text at notes 211-15 *infra*.

131. On the various provisions cited, see the authorities cited in note 129 *supra*.

country,[132] but rather declare the presence of any of the defendant's assets, be it of as limited value as an umbrella,[133] to be sufficient ground for the rendition of an in personam judgment for whatever may be the amount found due.

It should be stressed that the circumstance that Dutch rules of internal competence prescribe adherence to rules of this nature forms no reason for applying them in the determination of the jurisdiction of foreign courts.[134] Not only should Dutch courts exercise their independent judgment as to what constitute reasonable bases of jurisdiction, but their English brethren have shown them that this is quite well possible without disregard of binding, although perhaps less desirable, rules of internal judicial competence.[135]

All that has been said thus far concerns in personam judgments. In the case of status and in rem judgments, different criteria may prevail. When the foreign judgment presented for recognition determines merely the interest in a thing that was subject to the foreign court's power at the time of the commencement of the proceedings, jurisdictional requirements seem satisfied even though the defendant had no other contacts with the foreign forum.[136] Furthermore, in cases of status judgments, Dutch courts may well incline to the view that only courts of the domicile or perhaps nationality of the persons whose status is affected have jurisdiction.[137] This view would be grounded in the notion that only such courts have a sufficient interest in adjudicating controversies that tend to affect not only the litigants, but also the community at large. If the status of more than one person is involved, such as in divorce and separation cases, it may be argued that it is sufficient if only one of the parties to the relationship involved be domiciled at, or a national of, the foreign forum.[138] In that situation, the Dutch courts may well give weight to the reasonable interest of the foreign community in resolving

132. On the German rule, see Weser, *supra* note 117, at 327. On the analogous Swedish rule, see Ginsburg & Bruzelius, Civil Procedure in Sweden 4.24.b (Smit ed. 1965).

133. *Id.*, at 160.

134. *Accord*, Van Brakel, *op. cit. supra* note 106, § 91, at 126; Nysingh, *op. cit. supra* note 118, at 45. See also *supra* note 114.

135. In the landmark case of Schibsby v. Westenholz, L.R. 6 Q.B. 155 (1870), the Queen's Bench held that a French judgment rendered against an English domiciliary on a contract under which payment was to be made in France should not be recognized. The Court held that the French court had no jurisdiction and that the circumstance that an English statute prescribed a rule of competence that was the same as that relied on by the French court was irrelevant. It also held irrelevant that the French court had competence under French law.

Another argument for not judging the propriety of foreign bases of jurisdiction by internal rules of competence can be derived from treaties concluded by the Netherlands that specify as proper bases of jurisdiction not recognized by Dutch internal law. These treaties also provide significant support for the view that the various bases of jurisdiction discussed in the text are indeed reasonable. See Treaty between the Netherlands and Italy of April 17, 1959, 1959 Trb. 137 (effective May 18, 1963), art. 2; Treaty between the Netherlands and Germany of August 30, 1962, 1963 Trb. 501 (effective Sept. 15, 1965), art. 4.

136. See Smit, *supra* note 99, at 66-67.

137. *Cf.* Smit, *supra* note 99, at 64-66. *But see* text at notes 139-42 *infra*. See also Treaty between the Netherlands and Italy, *supra* note 135, art. 2(5) (in matters of status, court of nationality has jurisdiction).

138. *Cf.* Williams v. North Carolina, 317 U.S. 287 (1942) (court of domicile of only one of the spouses has jurisdiction to render divorce decree).

questions relating to the status of one of its members, rather than subordinate that interest to their own corresponding desire to regulate the status of Dutch nationals or domiciliaries.

Whether consent forms a proper basis of jurisdiction in status cases is a problem that does not seem to permit an unqualified answer. Insofar as Dutch courts require that status judgments be based on the same substantive rules as would have been applied in Holland, the answer should probably be in the affirmative. For example, foreign divorce judgments between Dutchmen are given effect only if rendered on grounds recognized by Dutch law.[139] If the requirements of this rule are not met, the jurisdictional question is devoid of significance because the judgment will be denied recognition in any event. But if they are met, it would not seem unreasonable to consider consent a sufficient jurisdictional basis.[140] On the other hand, if the foreign forum applied different substantive rules and the Dutch courts would not be ready to deny the foreign judgment recognition on that ground alone, a different answer would seem indicated.[141] Since, in the latter case, the parties could avoid application of substantive rules that ordinarily reflect a public interest, consent, which would enable avoidance of the rules merely by selection of an accommodating foreign forum, should not be judged a satisfactory basis of jurisdiction.[142]

This discussion of jurisdictional bases must necessarily confine itself to a sketch of broad outlines. However, it should give a sufficient indication of the considerations that should guide Dutch courts in their evaluation of the adjudicatory power of foreign courts.

c. *Proper notice and adequate opportunity to defend.* Another requirement of procedural due process is that the defendant must have been given proper notice and adequate opportunity to defend.[143]

Whether the defendant's opportunity to defend was adequate depends on evaluation of both the facts of the particular case and the rules of procedure governing the foreign litigation. The great variety of factors that may render inadequate the opportunity afforded to a litigant to defend himself will not be

139. See Kosters & Dubbink, Algemeen Deel 794 (1962), with citations to judicial and commentarial authorities.

140. The interests of the Dutch community are then safeguarded by application of the Dutch substantive law. Nor could Dutch public policy be frustrated by the foreign forum's treating the defendant's default or admission as sufficient to authorize pronouncement of the divorce decree, since the same circumstances are sufficient in the Netherlands. A problem could arise, however, in a contested divorce case if the foreign rules of procedure and evidence made it significantly easier for the plaintiff to succeed abroad than in the Netherlands. On this problem, see also Kosters & Dubbink, Algemeen Deel 831 (1962).

141. This situation is unlikely to arise when the status of Dutch nationals or domiciliaries is involved. In that case, Dutch public policy would be directly affected and Dutch courts would therefore be likely to require application of Dutch rules of substantive law. However, this situation may occur when the status of nationals or domiciliaries of one foreign country has been determined by a court of another foreign country. Unless the court of origin (*i.e.*, of the domicile or nationality) of the person involved recognized such a judgment, it would seem appropriate to deny it recognition in the Netherlands.

142. See *supra* note 141.

143. See, *e.g.*, Van Brakel, *op. cit. supra* note 106, § 92, with citation of cases.

explored in detail. Only one may be mentioned here and that is that the foreign procedure must leave the defendant sufficient time after receipt of the notice to make appropriate arrangements for his defense and, if necessary, his appearance.[144]

The requirement that the defendant must have been given proper notice is likely to create greater difficulties. Dutch authorities are ambivalent as to what criterion must be applied in determining the propriety of the notice.[145] In the following, a proper definition is provided in the context of a problem that is likely to arise.

Under Dutch law, defendants who are domiciled abroad and have no residence in the Netherlands may be served by delivery of the summons to the district attorney who must deliver the documents to the Ministry of Foreign Affairs.[146] A similar rule governs service on defendants whose domicile is unknown and who have no residence in the Netherlands.[147] In both cases, although ordinarily the Ministry, with the help of the Dutch consul abroad, endeavors to transmit the summons to the addressee whose foreign whereabouts are communicated to him, it is under no statutory obligation to make such attempt.[148]

Whether notice given under similar foreign rules should nevertheless be recognized as proper depends, first, on what criterion determines the propriety of the notice and, second, on whether satisfaction of this criterion is determined by the actual notice given to the defendant or by reference to the foreign rules of procedure regulating service of the notice.

It could be argued that any method of service that is the equivalent of a method of service prescribed for Dutch litigation should be regarded as proper.[149] If this argument were accepted, service on the foreign district attorney would be considered sufficient.[150] It would seem, however, that here again the pertinent inquiry is not into what the Dutch legislature has prescribed for Dutch litigation, but whether the foreign procedural steps taken correspond to domestic notions of fair procedure. Since these notions may be influenced, but are not invariably determined, by what the Dutch legislature has prescribed in a different context,[151] the basic question to be posed is whether the notice given was reasonable in the circumstances. The answer to that question provided by the United States

144. However, the mere fact that a party has not been afforded the requested opportunity of offering testimony does not deprive him of an adequate opportunity to defend. Gibbels v. Bremen, Arrondissements-Rechtbank Maastricht, November 12, 1936, [1938] N.J. No. 235.

145. *Cf.* Van Brakel, *op. cit. supra* note 106, § 92, who requires that there be "proper notice."

146. Code of Civil Procedure § 4(8)(1). On this provision, see Smit, International Co-Operation in Litigation: Europe 384-85 (1965).

147. Code of Civil Procedure § 4(7)(2) and (3). On this provision, see Smit, *op. cit. supra* note 146, 384-85 (1965).

148. *Id.*, at 385.

149. For a similar argument in relation to bases of jurisdiction, see text at notes 134-35 *supra.*

150. See text at notes 146-48 *supra.*

151. *Cf.* text at notes 134-35 *supra.*

Supreme Court also fits perfectly in the Dutch context: A notice is reasonable when it is reasonably calculated in the circumstances to lead to actual notice.[152] This is the standard to be applied in all cases in which the propriety of the foreign notice is drawn into question.

Under this criterion, service on the district attorney of a notice addressed to a defendant whose whereabouts are known would be insufficient if the propriety of the service were measured by reference to foreign procedural rules similar to those prevailing in the Netherlands.[153] However, since it is substantial justice in practice rather than in theory that is the objective of the rule requiring proper notice, the notice actually given rather than that required by foreign procedural rules should be decisive.[154] Accordingly, if the summons served on the district attorney did in fact reach the addressee or was tendered to him in time to enable him to present his defense, the notice would seem proper even though not required by foreign legal provisions.[155] In this respect, the contrary result reached by the United States Supreme Court in *Wuchter v. Pizzutti*[156] does not seem worthy of emulation. An important additional advantage of the rule under which the propriety of the notice is determined by what actually happened rather than by what is prescribed by the foreign law is that it avoids potentially troublesome questions of foreign laws relating to service.[157]

d. *Absence of fraud.* There is little doubt that a foreign judgment obtained through fraud will not be granted recognition in the Netherlands.[158] Nor is it necessary that the fraud be of the extrinsic variety. Recognition of any foreign judgment fraudulently obtained would be contrary to Dutch public policy.[159]

152. See, *e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); McDonald v. Mabee, 243 U.S. 90 (1917).

153. Since these rules would not require any attempt to forward the document to the addressee, service pursuant thereto would clearly not be reasonably calculated to lead to actual notice.

154. For a similar approach in regard to the jurisdictional requirement, see text at notes 120-23 *supra.*

155. A similar rule applies to service in domestic civil litigation in Austria. See Smit, *op. cit. supra* note 146, at 18 (1965). A more difficult problem would arise if the defendant acquired notice of the proceedings not because the summons on the district-attorney did in fact reach him or was tendered to him, but because he was notified in some other way—for example, by a letter mailed by the plaintiff or orally by a person who had heard of the institution of the proceedings. The rule stated in the text presupposes that the Ministry of Foreign Affairs, following its usual custom, did in fact forward the summons to the addressee; the examples given here raise the question of whether any kind of actual notice will suffice. Since an affirmative answer to the latter question would raise difficult problems as to the required nature and the contents of the notice that was actually given, the rule stated in the text seems preferable.

156. 276 U.S. 13 (1928) (actual notice effectuated by a method not prescribed by statute held insufficient, since the statutory provisions must create a method for service reasonably calculated to lead to actual notice).

157. Of course, under the rule stated in the text, it is still necessary that the actual summons issued in the foreign proceedings be forwarded or tendered to the defendant. Further, if under the foreign law, the defects in the service render the judgment null and void, determination of the foreign law cannot be avoided.

158. Van Brakel, Grondslagen en Beginselen van Nederlandsch International Privaatrecht, § 92 (1946); Kosters & Dubbink, Algemeen Deel 830 (1962).

159. The distinction between extrinsic and intrinsic fraud is not legally significant under Dutch law. See Hijmans, Praeadvies N.J.V. 1929, at 55. It is also being increasingly

e. *Application of proper law.* It has been argued that a foreign judgment must be denied recognition if the foreign court did not properly apply the conflict of laws rules that would have been applied by a Dutch court had it adjudicated the controversy.[160] Since in such a situation a second lawsuit before a Dutch court would not be mere duplication of the foreign litigation, this argument finds some support in the policies of res judicata.[161] Nevertheless, it seems unacceptable.

Under this rule, with conflict of laws rules so much in a state of turbulence all over the world, an element of undesirable uncertainty would be introduced by the substantial likelihood that Dutch courts would in many cases find a variance between the foreign and Dutch rules.[162] Furthermore, it would seem to depend on the circumstances of the individual case whether application of Dutch conflict of laws rules would be appropriate. For example, if the defendant were a domiciliary of the foreign forum or selected it, it would seem unreasonable to give him a second chance merely because the conflict of laws rules of the foreign forum differ from those prevailing in the Netherlands. He should not be able to complain about the rules of a forum with which he is so closely associated or that he himself selected. Indeed, it would seem that, if the foreign court had jurisdiction, a mere difference between foreign and Dutch conflict of laws rules should not preclude recognition. Although it must be conceded that relitigation in such a case would be less unreasonable than relitigation in a case in which the conflict of laws rules would be the same, it would still seem more vexatious than not to deny recognition to a foreign judgment that would otherwise be recognized.[163]

A different problem is presented when the foreign court applied substantive rules of law that are different from those that would have been applied by a Dutch court and the latter reflect a public policy from which neither the courts nor the parties may deviate. In that situation, recognition of the foreign judgment would give indirect sanction to what could not be accomplished directly and would therefore be improper.[164] It should be stressed, however, that a denial of recognition on this ground must be based on a finding that application of Dutch

abandoned in the United States. See Restatement, Judgments § 118, Comment f (1942). *But cf.* Peterson, *Res Judicata and Foreign Judgments*, 24 Ohio St. L.J. 317-10 (1963).

160. Josephus Jitta, Praeadvies N.J.V. 1888, at 63. This has long been the rule in France. Batiffol, Traité Elémentaire de Droit International Privé No. 760 (3d ed. 1959). It was specifically retained when the Cour de Cassation drastically limited re-examination of the merits of foreign judgments in Munzer v. Jacoby-Munzer, Cour de Cassation (Ch. civ., 1re sect.), Jan. 7, 1964, [1964] Bulletin des arrêts de la Cour de Cassation I., No. 15, p. 11.

161. See text at notes 63 and 85 *supra.*

162. Already in 1929, Nysingh considered the uncertain state of Dutch conflict of laws rules a serious objection to this approach. Nysingh, Praeadvies N.J.V. 1929, at 40-41. Since then, the uncertainties, both in the Netherlands and in foreign countries, have increased considerably.

163. The Dutch authorities generally agree. See Kosters & Dubbink, Algemeen Deel 828 (1962); Nysingh, *op. cit. supra* note 162, at 40-41; Hijmans, Praeadvies N.J.V. 1929, at 54.

164. *Accord,* Kosters & Dubbink, Algemeen Deel 828-29; Hijmans, *op. cit. supra* note 163, at 54-55.

rules is required by the Dutch public order. And such a finding is possible only if the Dutch public order is in some way involved.

f. *Miscellaneous.* Public policy also requires denial of recognition in the great variety of cases in which the substantive result reached by the foreign judgment is incompatible with basic Dutch notions of what is proper and fair. For example, public policy will forbid recognition of a judgment awarding the master the fruits of the labor of his slave.[165] Similarly, a Dutch court will deny recognition to a foreign divorce decree rendered between Dutchmen on a ground not recognized by Dutch law.[166]

There is support for the view that public policy also requires denial of recognition to judgments that enforce claims grounded in public, as distinguished from private, law.[167] Typical examples are judgments awarding tax claims, judgments imposing fines, and judgments rendered in antitrust matters. It can hardly be maintained, however, that the collection of taxes, the imposition of fines, or the injunction of anti-competitive conduct goes against the grain of Dutch notions of fairness. Accordingly, it would seem that, in the absence of evidence demonstrating the unfairness of the particular claims involved, foreign judgments enforcing such claims should not be denied recognition.[168]

2. *The foreign judgment must be final.* Dutch judgments are not given conclusive effect until they are no longer subject to the usual means of direct attack.[169] Since res judicata policies are generally of diluted strength when applied to foreign judgments, this rule of finality should be applied a fortiori to foreign judgments.[170] A consequence of acceptance of this argument would be that foreign judgments that are enforceable and res judicata under the law of their place of rendition even though they either have been appealed or are subject to appeal must be denied res judicata effect in the Netherlands.[171] This result would

165. Van Brakel, *op. cit. supra* note 158, § 58, at 89.

166. See *supra* note 139.

167. Batiffol, *op. cit. supra* note 160, No. 746.

168. For similar reasoning under American law, see Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 797 (1950).

169. It is to be noted that in Dutch, as distinguished from American, legal terminology judgments are ordinarily not called final until all means of direct attack have been exhausted. For a Supreme Court decision embracing the rule stated in the text, see Van Wijngaarden v. N.V. Handelsvereniging Holland-Bombay, Hoge Raad, May 7, 1926, [1926] N.J. 1057. *But see* 5 Asser, Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht 377-44 (5th ed. by Anema & Verdam 1953).

170. See text at notes 63 and 85 *supra*. Dutch authorities generally share the view that foreign judgments that are subject to direct means of attack should not be recognized. Nysingh, *op. cit. supra* note 162, at 49-50; Kosters & Dubbink, Algemeen Deel 825-26 (1962). *But cf.* Hijmans, *op. cit. supra* note 163, at 58-59.

171. In many states of the United States, judgments have res judicata effect and can be enforced through the levy of execution even though they are still subject to appeal or have been appealed. For an enumeration, see 9 A.L.R.2d 984 (1950). However, even in the United States, where the full faith and credit clause requires recognition of sister-state judgments, it has been held that a state need not enforce a sister-state judgment by rendering judgment on it and levying execution if the judgment is appealable or has been appealed in the state of origin. See Paine v. Schenectady Ins. Co., 11 R.I. 411 (1877). See also Restatement (Second), Conflict of Laws § 435, Comment e, and § 438, Comment b. To that extent the dilution of the strength of res judicata policies is recognized even in a

seem properly to ensure uniform treatment of all foreign judgments irrespective of the rules of enforcement and res judicata that may happen to prevail in the foreign country. It also appropriately effectuates Dutch rather than foreign policies.[172]

C. *Substantive Recognition Rules*

1. *The Supreme Court decisions.* Although Dutch law has no formal rule of stare decisis, Dutch lawyers will not seriously dispute the truism that Dutch law is what the Dutch Supreme Court says it is. Therefore, a discussion of rules defining the extent of recognition to be accorded to foreign judgments must, of necessity, start with the Supreme Court decisions on the subject.

The Dutch Supreme Court has adhered with remarkable consistency to a general formula that, although of embracing scope, leaves a large measure of uncertainty. It has stated repeatedly that section 431 of the Code of Civil Procedure prohibits execution and the giving of res judicata effect to foreign judgments, but that the Dutch courts are free to determine in each particular case whether and to what extent recognition should be given to such judgments.[173] This formula is neither particularly helpful nor quite consistent. It is not helpful because it leaves uncertain what factors should influence a Dutch court to give binding effect to a particular foreign judgment; it is inconsistent insofar as it first prohibits the giving of res judicata effect to a foreign judgment, but then, as it were giving back with the left hand what it took away with the right, permits a Dutch court to give binding effect to foreign judgments merely because the court finds it appropriate to do so in the particular case presented. As Meijers and Scholten have noted, it is difficult to see in what regard the latter is different from giving the foreign judgment res judicata effect.[174]

Since the formula adopted by the Supreme Court leaves this considerable degree of uncertainty, it would seem appropriate to consider in greater detail the more important of the Court's decisions in order to ascertain whether the final results they reached permit the formulation of more particular guidelines.

As early as 1902, the Supreme Court was called upon to decide whether

federal context. Because of the attenuated strength of res judicata policies as applied to foreign judgments, a denial of recognition would seem appropriate even if the forum where recognition is sought generally does grant res judicata effect and enforcement through execution to domestic judgments that are subject to appeal or have been appealed. *But cf.* Slade v. Dickinson, 82 F. Supp. 416 (W.D. Mich. 1949) (stressing Fed. R. Civ. P. 62(d) and 73(d)); Weiss v. Metalsalts Corp., 72 N.J. Super. 264, 178 A.2d 240 (1962) (no appeal had in fact been taken and only the form, not the propriety of the amount, of the judgment rendered was questioned). Similarly, if the foreign court provided explicitly for execution notwithstanding appeal on the basis of rules analagous to §§ 52 and 53 of the Dutch Code of Civil Procedure, which permit this in a limited number of circumstances, recognition should nevertheless be denied in the Netherlands. For a similar result, see Buchel v. Carabedian, Tribunal civil de la Seine (5e Ch.), Feb. 1, 1956, 45 Revue Critique de Droit International Privé 536 (1956).

172. *Cf.* Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 63 (1962).

173. See notes 178-95 *infra* and accompanying text.

174. Meijers, Opstellen 308 (1955); Meijers, [1932] N.J. 1265; Scholten, [1931] N.J. 896.

the English defendants in a Dutch action, one of whom had previously prevailed as plaintiff in an English lawsuit against his Dutch opponent, could invoke the English judgment as res judicata.[175] The Supreme Court held that section 1954 was applicable only to Dutch judgments and that section 431 of the Code of Civil Procedure, providing for relitigation of the dispute, was incompatible with invocation of the foreign judgment as res judicata.

This landmark decision, denying foreign judgments res judicata effect, was followed by a decision in which the Supreme Court upheld a lower court that had given conclusive effect to an American divorce decree.[176] A New York court had pronounced a divorce between Dutch spouses, who were domiciled in New York, on the ground of adultery. In a subsequent Dutch proceeding initiated by the mother as the guardian of her son, the question arose whether the New York divorce was conclusive in the Netherlands.[177] The Hague Court of Appeal answered in the affirmative, and the Supreme Court affirmed. It held that a general prohibition to recognize as valid foreign divorce decrees between Dutch spouses does not exist and that section 431 of the Code of Civil Procedure, since it prohibits only execution of foreign judgments and recognition of a divorce decree cannot be characterized as such, was inapplicable. No mention was made of paragraph 2 of section 431.

The next decision of note was rendered in the famous *Fur Coat* case.[178] A Dutch furrier had sold a fur coat to an English officer, who, during his detention in World War I, had given it as a present to his mistress. Upon the Englishman's death, the furrier presented the bill to his executors who refused to pay. The furrier brought suit in England to recover the purchase price, but his claim was rejected on the ground that the coat's destination rendered the contract unenforceable. Not discouraged by this result, the furrier brought another action against the executors in the Netherlands. The Supreme Court affirmed the rejection of his claim by the lower courts.

It held that the general rule applied by the lower court, namely that the Dutch courts must determine in each individual case whether and to what extent authority should be accorded to a foreign judgment conflicted neither with section 1954 of the Civil Code nor with section 431 of the Code of Civil Procedure.[179] For this purpose, it reiterated that foreign judgments did not have res judicata effect in the sense of section 1954 of the Civil Code and found further that section 431 of the Code of Civil Procedure was inapplicable because it deals

175. Breadhead v. N.V. Stoomvaartmaatschappij Zeeland, Hoge Raad, January 31, 1902, W. 7717.

176. N.V. Eerste Nederlandsche Verzekering Maatschappij v. M.S.M., Hoge Raad, November 24, 1916, W. 10098.

177. If it was, under the Dutch law applicable at the time, the mother had become the child's guardian *ipso iure*. Civil Code § 284 (this section was subsequently amended).

178. Kühne & Zonen v. Platt, Hoge Raad, November 14, 1924, [1925] N.J. 91.

179. [1925] N.J. at 94. It is worth stressing that this rule was not formulated by the Supreme Court, but by the appellate court.

with execution of foreign judgments and execution of the English judgment was not sought.[180]

The lower court, after having stated the general rule found unobjectionable by the Supreme Court, had held the furrier bound by the English judgment on the ground that it would be contrary to good faith and fairness to permit him to relitigate his claim after he had voluntarily invoked the aid of the English court and the latter had rejected his claim. This finding the Supreme Court held to be a particular application of the general formula, the propriety of which it could not review.[181]

The Supreme Court also approved the lower court's finding that the English judgment, assuming it was binding, could not be denied recognition on the ground that the English court had applied English law to find the invalidity of the agreement, even though it was governed by Dutch law under which it was valid. It held that only a conflict with Dutch public policy could justify non-recognition and that no evidence of such a conflict was present.

This decision is remarkable in several respects. In the first place, the Supreme Court, in holding that section 431 of the Code of Civil Procedure relates only to execution of foreign judgments, conveniently overlooks the provision of paragraph 2 of that section which provides that the underlying dispute may be litigated anew.[182] Clearly, if given a broad interpretation, this provision would raise a troublesome impediment to approval of the lower court's decision.

Furthermore, the Supreme Court refused to review the propriety of the lower court's application of the general formula to the particular case presented. At the time of the decision, this ruling, which left the lower courts the task of applying a formula that provided no standards whatever for determining the recognition to be given in a particular case,[183] was probably unavoidable. At that time, the Supreme Court's review was limited to cases involving improper application of statutory provisions.[184] However, at present, the Supreme Court may review all cases involving misapplication of any rule of law, irrespective of whether it is statutory in nature.[185] Accordingly, this branch of the Court's holding would seem to have lost its significance.[186]

Finally, and more helpfully, the Supreme Court's decision does affirm that mere misapplication of the applicable rules of (conflicts) law is not sufficient ground for denial of recognition on the ground of public policy.[187]

180. The Court made no reference to paragraph 2 of § 431. See also text at notes 182-83 *infra*.

181. [1925] N.J. at 94-95. *But see* the text at notes 184-86 and 248-49 *infra*.

182. It had also done so in the decision cited in note 176 *supra*, even though, in the decision cited in note 175 *supra*, it had explicitly based its holding on the fact that foreign judgments have no res judicata effect on this paragraph.

183. Especially since the court had held that the foreign judgment was binding.

184. Wet op de Rechterlijke Organisatie (Law on Judicial Organisation) § 99 (before its amendment by law of June 20, 1963, S. 272, which became effective on July 24, 1963).

185. *Id.*, as amended. On the impact of this amendment, see also Veegens, Cassatie in Burgerlijke Zaken No. 69 (1959).

186. See also text at notes 248-50 *infra*.

187. See text at notes 160-64 *supra*.

The *Fur Coat* case evoked multifarious comments.[188] Its learning was followed in two frequently cited decisions, the *Swiss Child No. 1*[189] and the *Swiss Child No. 2*[190] cases.

In the *Swiss Child No. 1* case,[191] the Dutch guardian ad litem of a child born out-of-wedlock in Switzerland to a Swiss mother brought an action against the alleged German father, who was not domiciled in the Netherlands, to recover support for the child under Dutch law. The father defended on the ground that a similar action brought under Swiss law had already been decided in the child's favor in Switzerland and that the child could assert only rights arising from the Swiss judgment. The Court of Appeal of The Hague held this to be a good defense, but the Supreme Court reversed. The Court of Appeal had based its decision on the ground that the Swiss judgment determined the personal status of the child and therefore, under Dutch conflict of laws rules, followed the child wherever it went. The Supreme Court held that, under the Swiss law applied by the Swiss court, the Swiss finding that the defendant was the father of the child did determine the child's personal status, but that the same was not true of that part of the judgment that ordered the defendant to pay support. Furthermore, the Supreme Court held that section 431 of the Code of Civil Procedure specifically authorized a litigant who had obtained a judgment abroad to institute his action anew before a Dutch court without being obliged to base his claim on the foreign judgment and that the lower court's decision, to the extent it denied the child the right to bring an action for support not based on the Swiss judgment, therefore came into conflict with section 431.

This decision was followed seven years later by the *Swiss Child No. 2* case,[192] which presented fairly analogous facts, but resulted in a different decision on the personal status question. In this case, a child born out-of-wedlock in Switzerland to a Swiss mother brought an action for support under Dutch law against its alleged Dutch father who was domiciled in the Netherlands. The Court of Appeal of The Hague, no doubt mindful of the fate of its decision in the *Swiss Child No. 1* case, held that the Swiss judgment obtained by the child against the alleged father in Switzerland determined the child's personal status and that, consequently, the defendant could not be heard to contend that he was not the father. The Supreme Court reversed. It held that the Swiss court, in awarding support to the child, had applied Dutch law and that under the applicable Dutch law an award of support did not affect the personal status of the child, but created only pecuniary claims. The lower court, by holding itself bound by the Swiss judgment, had therefore acted in violation of section 431 of the Code of Civil Procedure. The Supreme Court repeated that this provision

188. See, *e.g.*, Meijers, W.P.N.R. Nos. 2878-79, 2881 (1925); Veegens, 7 N.L.B. 624 (1932).
189. Plantenga q.q. v. J.A., Hoge Raad, March 20, 1931, [1931] N.J. 890.
190. C.v.d.S. v. Bannier q.q., Hoge Raad, April 1, 1938, [1938] N.J. No. 989.
191. See note 189 *supra*.
192. See note 190 *supra*.

does not prevent a Dutch court from determining in each individual case whether and to what extent to recognize a foreign judgment. However, it held that a provision that prohibits execution of foreign judgments and specifically permits the disputes to be brought anew in Dutch courts is incompatible with an obligation on the part of a Dutch court to abide by the foreign judgment.[193]

The general formula to which lipservice was paid in the *Swiss Child No. 2* case was also applied in a decision that intervened between the two *Swiss Child* cases, but that affirmed a lower court holding giving conclusive effect to a foreign judgment. In the *Hungarian Mortgage* case,[194] a Hungarian borrower had given a mortgage on Hungarian real estate as security for the repayment of bonds issued by him. A Dutch bank sought an order from the Dutch court directing that the mortgage be registered in its name. The alleged trustee, in resisting this application, invoked a prior judgment rendered by an Hungarian appellate court which had directed that the mortgage be registered in the Hungarian registers in the name of the trustee. The Hague Court of Appeal held the Hungarian judgment binding and rendered judgment against the bank. The Supreme Court affirmed. It repeated its general formula and stressed that the Court of Appeal had found the Hungarian judgment binding only because of the particular circumstances of the case before it and not because it considered itself always bound by foreign judgments. The particular circumstances that in this case warranted recognition were summarized by the Supreme Court. It noted that the Hungarian court, after an extensive examination, in which due attention was paid to the objections advanced by the bank, had decided in adversary proceedings and in an elaborately reasoned opinion that the registration that it ordered should also have been ordered by the Hungarian court on its own motion.[195]

One may ask why these circumstances rendered proper the giving of conclusive effect to the Hungarian judgment. They indicate no more than that the Hungarian court gave the bank an adequate opportunity to defend and took its task seriously. Surely, if circumstances of this nature are sufficient to render a foreign judgment binding, the Supreme Court's formula means little more than that foreign judgments may be given binding effect whenever the lower courts are disposed to give them such effect. A rule of that nature is unlikely to promote certainty in an area in which it becomes increasingly needed.

Nevertheless, taken together, these Supreme Court decisions warrant the conclusion that they are compatible in result with rules that properly reflect pertinent res judicata policies. It is true that the Supreme Court has said time

193. For a literal translation of part of its opinion, see text at note 34 *supra*.

194. N.V. Burger's & Co. Bank v. Van Asch van Wijk q.q., Hoge Raad, June 24, 1932, [1932] N.J. 1262.

195. *But cf.* Veegens, 7 N.J.B. 624-25 (1932), who states that the Supreme Court's opinion leaves the reader in the dark as to the particular circumstances that warranted the giving of conclusive effect to the Hungarian judgment. Apparently, Veegens does not believe the circumstances mentioned by the Supreme Court to be sufficiently particular. See text following this footnote.

and again that foreign judgments have no res judicata effect, but in appropriate cases it has permitted lower courts nonetheless to grant such judgments conclusive effect.[196] The logical consistency of the Supreme Court's analysis was preserved, because the conclusive effect was granted under a formula giving discretionary power to, rather than imposing a duty upon, the lower courts to recognize the foreign judgment as binding. However, by approving of the granting of binding effect merely because the foreign court proceeded reasonably, the Supreme Court has made clear that the granting of binding effect under its formula comes rather close to granting conclusive effect outright.

This does not mean that the Supreme Court's holdings tend to support the general conclusion that foreign judgments must always be granted conclusive effect. Rather, the actual results approved by the Supreme Court must be studied before conclusions can be drawn as to when the granting of conclusive effect is proper.

In the first place, it is reasonably clear that, if the prerequisites to recognition are met, status judgments will be accorded binding effect. The 1916 decision[197] and the *Swiss Child No. 1* case[198] support this conclusion. Nor does it make any difference whether the theoretical basis for the recognition is said to rest in a choice of law rule that requires recognition of a personal status created abroad or in recognition of the status judgment proper.[199] Under either approach, the actual result is that the foreign decree creating the status is accorded conclusive effect.

Secondly, foreign judgments determining the interest in a thing subject to the foreign court's jurisdiction are recognized. While it may be conceded that in the *Hungarian Mortgage* case[200] this result was reached by recourse to the Supreme Court's general formula, the fact remains that the foreign judgment in that case determined the interest of the mortgagees in real property situate in Hungary.

Thirdly, in the case of in personam judgments, binding effect was denied to foreign judgments that had been rendered against defendants who were neither domiciliaries nor nationals of the foreign forum.[201] However, conclusive effect was given to a foreign judgment that had been elicited abroad by the person against whom it was invoked.[202]

The compatibility of the results reached in these leading cases with the rules indicated above[203] and further developed below[204] is significant because

196. See notes 176, 178, and 194 *supra* and accompanying text. For an attempted rationalization of the Supreme Court's decisions, see also Ter Horst, *Gezag van vreemde vonnissen hier te lande*, W.P.N.R. 3600-01 (1938).

197. See *supra* note 176.

198. See notes 189 and 191 *supra* and accompanying text.

199. For the first-mentioned explanation, see Van Brakel, *op. cit. supra* note 158, § 88, at 122-23.

200. See note 194 *supra* and accompanying text.

201. See cases cited in notes 175, 189, and 190 *supra*.

202. See case cited in note 178 *supra*.

203. See text at notes 85-102 *supra*.

204. See text at notes 209-38 *infra*.

it permits a shift to these rules without rendering questionable the results reached by prior case law. Indeed, it may well be that the flexible formula was chosen deliberately because more particular standards were not available.[205] Now that these standards can be formulated, relinquishment of a formula that is so instinct with uncertainty seems appropriate.[206]

2. *The interpretation of section 431.* Rules regulating the effect of foreign judgments in the Netherlands must necessarily be formulated in the context of section 431 of the Code of Civil Procedure. Because of the inflexible nature of the prohibition contained in this provision, it would seem desirable to give it a narrow interpretation, so that more flexible rules can be adopted for the area it leaves uncovered. Narrow interpretation is not only desirable, as indicated, it is also supported by the section's legislative history.[207] Accordingly, section 431 should be interpreted to prohibit only execution and the giving of res judicata effect to foreign judgments rendered against defendants who were sued involuntarily away from their domicile.

It would undoubtedly have been better if the first two paragraphs of section 431 had never been enacted into positive law. In their present form, they have impeded the development of proper rules and required the courts in proper cases to construct roundabout rules in order to accord recognition to foreign judgments.[208] Accordingly, rather than re-enact these paragraphs in their present form, the Dutch legislature, in 1964, would have performed a considerably more useful task if it had simply repealed them. However, since section 431 is on the books, it cannot be disregarded completely. Adoption of the narrow interpretation proposed would seem the best solution possible in the circumstances.

3. *Status and in rem judgments.* Section 431 of the Code of Civil Procedure should further be construed as not applicable to foreign status judgments.[209] In the case of such judgments, it is not execution that is sought, but only recognition in the Netherlands of a status created by a foreign court. Since such judgments are properly speaking not susceptible of execution, it can be argued persuasively that they come neither within the coverage of paragraph 1, nor, inasmuch as paragraphs 1 and 2 are coextensive in their reach, within that of paragraph 2 of section 431.[210]

Similar reasoning can also be employed to avoid the applicability of section

205. *Cf. supra* note 179.

206. As Meijers has properly noted, if this formula were retained, "law practitioners will continue to remain in uncertainty as to whether a foreign judgment will be granted conclusive effect for more than a hundred years." [1933] N.J. 1750.

207. See text at notes 16-22 *supra.*

208. *Accord,* Hijmans, Praeadvies N.J.V. 1929, at 44; Nysingh, Praeadvies N.J.V. 1929, at 59 (as to paragraph 2 of § 431).

209. See the Supreme Court decisions cited in notes 176 and 189 *supra.* The writers are generally agreed that status judgments should be accorded recognition. See Kosters & Dubbink, Algemeen Deel 793-95 (1962); Nysingh, *op. cit. supra* note 208, at 18; Hijmans, *op. cit. supra* note 208, at 39; Scholten, [1931] N.J. 895-96.

210. In its decision of 1916, *supra* note 176, the Supreme Court properly argued that recognition of a status judgment is not the same as its execution. W. 10098, at 2. It completely omitted any reference to paragraph 2 of § 431, however.

431 to most in rem and quasi-in-rem judgments.[211] Ordinarily, the thing to which they relate will be abroad and foreign judgments that determine an interest in a thing that is outside of the Netherlands cannot be enforced by execution there.[212] However, if the thing is brought within Dutch borders, institution of enforcement measures would become possible. And if in such a case the defendant in the foreign proceeding were a Dutch domiciliary, section 431, even if interpreted narrowly, would make it difficult to accord the foreign judgment conclusive effect.

Under present law, the easiest way to avoid this obstacle would undoubtedly be for the lower court to stress the in rem nature of the foreign proceeding and to give the foreign judgment conclusive effect under the Supreme Court's formula.[213] However, if this formula is to be discarded in favor of more specific standards, it would seem more appropriate to argue either that the legislature never thought of in rem judgments and that therefore section 431 does not cover them, or that in the case of in rem judgments the proceedings are directed at the thing rather than at whoever may appear to contest the plaintiff's claim and that therefore such proceedings, in which a thing rather than a defendant is being sued, can never give rise to application of a provision designed to protect a defendant from being sued away from home.

Apart from these interpretative difficulties arising from section 431, formulation of the rules that should govern the recognition of foreign status and in rem judgments creates no particular problems. The res judicata policies enunciated above dictate recognition of such judgments,[214] provided, of course, the general prerequisites to recognition, including those relating to jurisdiction, are met.[215]

4. *In personam judgments.* As indicated, pertinent res judicata policies would seem to justify recognition only of foreign in personam judgments rendered against a litigant who was a domiciliary of, or who selected, the foreign forum.[216] A rule so limiting recognition of foreign in personam judgments would also accord with the narrow construction of section 431 here espoused. Under this rule, a foreign in personam judgment obtained against a non-domiciliary of the foreign forum would be entitled to recognition only if he

211. For definitions of in rem and quasi-in-rem judgments, see text at notes 93-98 *supra*. For simplicity's sake, the discussion in the text frequently speaks only of in rem judgments, but the reasoning employed applies to both types of judgments. See also note 212 *infra*.

212. Since, by definition, the execution must be levied on the thing.

213. Kosters & Dubbink, Algemeen Deel 795-96 (1962), argues that foreign judgments determining in rem rights in things do not come within the ambit of § 431 since they do not lend themselves to execution. This is often, but not invariably, true. For example, a quasi-in-rem judgment may direct sale upon execution of the thing creating jurisdiction in order to satisfy a personal obligation. See Restatement, Judgments § 76 (1942). That type of judgment lends itself quite well to execution in the Netherlands. See Code of Civil Procedure § 439-74.

214. See text at notes 90-96 *supra*.

215. See text at notes 136-42 *supra*.

216. See text at note 99 *supra*.

selected that forum. In that case, since its legislative history demonstrates that it was designed to protect only defendants who are sued away from their natural forum[217] and a defendant who has consented to so being sued deserves no protection, section 431 would be inapplicable.

Whether the defendant was a domiciliary of the foreign forum at the time of commencement of the foreign proceedings must be determined under Dutch concepts. It is Dutch res judicata policy that requires membership in the foreign community before a judgment originating in that community can be accorded recognition and Dutch notions must therefore govern as to what constitutes membership in the foreign community. It follows from this that findings in the foreign judgment as to the defendant's domicile, inasmuch as they will ordinarily have been made under foreign law, are not binding on the Dutch court. The latter must determine on the basis of all relevant circumstances whether the defendant was domiciled at the foreign forum at the time the foreign proceedings were commenced.[218]

The second category of foreign in personam judgments that should be given conclusive effect embraces every judgment rendered by a forum that was selected by the litigant against whom the judgment's recognition is sought.[219] Within this category fall, in the first place, all judgments rendered in foreign proceedings that were initiated by the litigant against whom the judgment that resulted is invoked. It might be argued that this rule should prevail only if the litigant instituted the foreign proceedings voluntarily—that is, if he selected the foreign forum, while a forum at his domicile was available. According to this argument, this would be the only case in which the litigant could voluntarily forego the opportunity to obtain a decision by his natural forum; if he had no alternative and the foreign forum offered the only opportunity for obtaining an effective judgment, his choice of the foreign forum was hardly made voluntarily and he should therefore not be burdened with its extraterritorial consequences.[220] Although the competing policies may be approximating a state of equipoise, it would seem preferable to grant conclusive effect to foreign in personam judgments in all cases in which the litigant against whom the recognition is sought instituted the foreign proceedings. It may be, however, that, if the litigant had no choice, more differentiating treatment is proper. The foreign judgment could perhaps be recognized to the extent it grants the winning party costs and counsel fees, but relitigation on the merits could be permitted. This

217. See text at notes 16-22 *supra.*

218. It should be stressed that the substantive content of the term domicile is not necessarily the same for this purpose as for other purposes. The concept of domicile is defined generally in Civil Code § 74-82. As a rule, these provisions can also do service in this context. It should be kept in mind, however, that the concept of domicile, within the context of the rule stated, must necessarily denote actual membership in the foreign community. For example, making one's home in a particular community for a reasonably extensive period of time would seem to qualify as domicile for the purpose of the rule stated in the text, although it might be characterized as residence for other purposes.

219. See text at note 99 *supra.*

220. *Accord,* Hijmans, *op. cit. supra* note 208, at 42.

solution would have the advantage of striking an appropriate balance in a difficult situation.[221]

Mere appearance by a defendant in foreign litigation is not sufficient to qualify him as the selector of the foreign forum.[222] A defendant who seeks to protect his assets at the foreign forum should not have to choose between relinquishing them or extending the effect of a possible judgment against him to assets that are not within the grasp of the foreign sovereign.[223]

If the defendant counterclaims, the situation becomes different. If the counterclaim was compulsory,[224] its interposition was a necessary consequence of the initiation of litigation by the opponent and failure to interpose it would have resulted in its loss. Here again, it would not seem reasonable to compel the defendant either to forfeit his claim or to run the risk of his opponent's obtaining a judgment with extraterritorial effect against him.

However, there are respectable arguments for a different approach. If the counterclaimant had been successful, the judgment he had obtained would have been entitled to recognition in the Netherlands as having been obtained against the initiator of the foreign proceedings.[225] To that extent, the counterclaimant would be in a more favorable position than the one in which he would have been had he brought the foreign proceedings initially against a non-domiciliary of the foreign forum. Furthermore, if the counterclaimant had refrained from interposing his claim, he would have lost it at the foreign forum, but he would not have been precluded from asserting it in the Netherlands. These circumstances might be argued to support the granting of conclusive effect to a foreign judgment rendered on a compulsory counterclaim. Or it might be contended that this is again a case in which an intermediate solution, granting effect to an award of costs and counsel fees but permitting relitigation of the merits, would be appropriate.

While these arguments have merit and render resolution of this problem difficult, the rule denying recognition to foreign judgments on compulsory counterclaims would seem on balance to be the more commendable.

Recognition of a judgment rendered on a counterclaim is appropriate, however, if the counterclaim was permissive. Since in that case the defendant had the choice of submitting his counterclaim without running the risk of forfeiture, he should accept the results of his choice. Indeed, in case of inter-

221. The notion that the harassment resulting from repetitive litigation should give rise to a claim for recovery of the costs and counsel fees expended in vain rather than to preclusion is one that deserves further exploration. *Cf.* Fed. R. Civ. P. 41(a)(2).

222. For lower court case law which generally comes to the same conclusion, see Kosters & Dubbink, Algemeen Deel 799-801 (1962).

223. See Hijmans, *op. cit. supra* note 208, at 42. See also Smit, *supra* note 172, at 69-71.

224. Whether a counterclaim is compulsory, *i.e.*, must be interposed or be lost forever, must be determined by reference to the applicable foreign law. For foreign rules on compulsory counterclaim, see, *e.g.*, Fed. R. Civ. P. 13(a).

225. It would seem reasonable to burden the initiator of the foreign proceedings not only with the consequences of the failure of his own actions, but also with those of any counterclaim properly interposed.

position of a permissive counterclaim, it would seem reasonable also to give conclusive effect to the foreign judgment insofar as it adjudicates the principal claim. By asserting his permissive counterclaim, the defendant has cast himself in exactly the same position in which he would have been, if he had initiated the foreign proceedings and his opponent had asserted a counterclaim.[226]

The rule that the selector of the foreign forum is bound by its judgments also extends to all forms of contractual selection. If the parties, either contemporaneously with, or in advance of, the dispute, agreed to submit it for adjudication to a foreign court, they should be made to abide by their choice. Accordingly, a foreign judgment rendered by a so-called forum contractus should be accorded conclusive effect.[227] As shown, section 431 of the Code of Civil Procedure can be construed to accomplish this result.[228] Whether the forum selecting contract was valid is to be determined by reference to Dutch rules. Findings in this regard by the foreign forum are not binding on the Dutch court.[229]

It might be argued that if reasonableness is to be the ultimate test, all foreign judgments rendered on an adequate jurisdictional basis should be accorded recognition;[230] for since, by definition, a foreign court that had jurisdiction proceeded on a reasonable basis, it could hardly be unfair to recognize its judgment. The reply to this line of reasoning is that the reasonableness of a court's rendering a judgment that is territorially limited in its effect does not necessarily imply the reasonableness of granting such a judgment extraterritorial recognition. It must be conceded, however, that questions of jurisdiction and recognition are closely related and that, once appropriate standards of jurisdiction are met, the foreign judgment's claim for recognition gains considerably in appeal.[231] Nevertheless, recognition of foreign judgments premised merely on the satisfaction of jurisdictional requirements and the other general prerequisites to recognition would not seem proper. First, it would be incompatible with even the narrowest interpretation of section 431 of the Code of Civil Procedure;[232] and second, it would broadly extend recognition to judgments rendered in all

226. To the same effect, see N.V. Carrières et Fours à Chaux v. Brock, Arrondissements-Rechtbank Maastricht, June 5, 1930, W. 12258. On the consequences of interposing a counterclaim generally, see Van Praag, *Welke Kracht Hebben in Nederland de door Vreemde Rechters in Burgerlijke Zaken Gewezen Vonnissen?*, 47 R. M. 337, 370 (1928), and authorities cited. See also lower court case law cited by Kosters & Dubbink, Algemeen Deel 800 n.149 (1962).

227. Dutch authorities generally incline to the same view, albeit that they may give such effect under the Supreme Court's formula or on the ground that the Dutch action seeks merely enforcement of the parties' contract. See, *e.g.*, Kosters & Dubbink, Algemeen Deel 799, 804 (1962); Kollewijn, American-Dutch Private International Law 35 (2d ed. 1961), and authorities cited.

228. See text at note 217 *supra.*

229. The Supreme Court has reached the same conclusion with respect to a foreign judgment confirming a foreign arbitration award. See Westhoff v. Ulftsche Jzergieterij, Hoge Raad, October 17, 1932, [1933] N.J. 106. In this case, the Dutch court disregarded a finding by a German court that a valid arbitration agreement had been concluded.

230. Nysingh favors a rule to this effect. Nysingh, Praeadvies N.J.V. 1929, at 69.

231. *Cf.* the rule probably prevailing in the United States. Smit, *supra* note 172, at 45, 62-63.

232. See text at notes 23-40 *supra.*

countries, including those whose political and legal structure is pervasively different from that of the Netherlands.[233]

5. *Multiple prior judgments.* When recognition is sought for multiple inconsistent judgments, distinctions must be made depending on date and country of origin.

If one of the prior judgments was rendered by a Dutch court, whether before or after rendition of the foreign judgment, only the Dutch judgment should be recognized. This follows not only from section 1954 of the Civil Code, but also from the greater strength of res judicata policies applicable to Dutch judgments.[234]

If all prior judgments were rendered in the same foreign country and only one is entitled to recognition under the rules here proposed, only that judgment should be recognized.[235] If more than one of these judgments is entitled to recognition and the res judicata effect of the earlier judgment was determined in the later proceedings, the last judgment entitled to recognition should be recognized exclusively;[236] but if the res judicata effect of the prior judgment was not determined by the subsequent judgment, neither should be recognized.[237]

If the prior judgments were rendered in different foreign countries and only one is entitled to recognition under the rules here proposd, recognition should be granted to the judgment qualifying for it. If more than one of these judgments is entitled to recognition, it would probably be best to withhold recognition altogether, unless it could be shown that the country that issued the last of the judgments gives res judicata effect to judgments rendered to prior foreign judgments of the nature involved and the last judgment determined the res judicata effect of the prior judgment.[238]

6. *Forms of recognition.* Recognition of foreign judgments may take various forms. It may consist of the levying of execution on the foreign judg-

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233. The more pervasive the differences, the less reasonable it would be to grant conclusive effect to the foreign judgment. See text at notes 63 and 85 *supra.* Of course, it may be possible to deny effect to some of these judgments on the ground that they do not meet the general prerequisites to recognition. In many cases, however, it may be impossible to single out a particular circumstance warranting denial of recognition. Significantly, foreign countries may scrupulously adhere to the formalities of proper administration of justice without doing justice in substance.

234. To the same effect, see Boonzajer Flaes v. Ekelund, Arrondissements-Rechtbank, Arnhem, November 5, 1936, [1938] N.J. No. 245. See also Kosters & Dubbink, Algemeen Deel 807-08 (1962).

235. Irrespective of whether under the foreign law another judgment were to prevail.

236. This result would seem proper, because, by hypothesis, the parties litigated the res judicata effect of the prior judgment and should therefore be bound by the determination. For a similar result under American law, see Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939). The mere circumstance that the res judicata effect of the prior judgment could have been litigated should not be sufficient to warrant application of the rule stated in the text. Under Dutch res judicata rules, that would not have precluded the parties from relitigating it. See text at notes 68-69 *supra.*

237. The presence of two inconsistent foreign judgments seems sufficiently to weaken the propriety of reliance on either to render relitigation appropriate.

238. See *supra* note 236.

ment. This is permitted only in cases specifically designed by treaty or law.[239] Newly adopted sections 985 through 994 of the Code of Civil Procedure prescribe the procedure to be followed.[240]

If execution is not possible, the victorious party may wish to bring an action on his foreign judgment rather than on his original claim. If under the applicable foreign law the judgment that is entitled to recognition gives rise to such an action nothing would seem to prevent its successfully being brought in the Netherlands.[241]

Alternatively, the victorious party may bring an action on his original claim and invoke the foreign judgment as res judicata.[242] Specifically, it would be undesirable to limit the victorious party to an action on the foreign judgment because under the foreign law his claim for relief merged into the judgment.[243] Leaving him the choice would permit him to avoid the necessity of proving the foreign merger rule and, should he so desire, to prove his original claim rather than rely on the foreign judgment.[244]

The foreign judgment may also be invoked as res judicata defensively. However, invocation of the foreign judgment as res judicata is necessary. There is no reason to deviate from a rule that also prevails as to domestic judgments.[245]

Recognition does not imply that special relief awarded by the foreign judgment must be made available in the Netherlands. Insofar as Dutch law provides for similar relief, it should reasonably be granted. But if different, and perhaps better, relief is made available by Dutch law, nothing precludes its being awarded.[246] Indeed, in the *Swiss Child No. 1* case,[247] the Supreme Court specifically held that it would be appropriate for a Dutch court to secure compliance with an obligation to pay support grounded in Swiss law by requiring the obligor to provide security in accordance with applicable Dutch rules.

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239. Section 431 of the Code of Civil Procedure specifically so provides.

240. It may well be asked whether the legislature would not have performed a more useful function if it had addressed itself to the merits of paragraphs 1 and 2 of § 431 rather than to the procedure for executing foreign judgments in the exceptional cases in which execution is available. See text at notes 12 and 208 *supra; Funke, Verlof tot tenuitvoerlegging van in vreemde Staten totstandgekomen executoriale titels (Exequatur-ontwerp)*, 39 N.J.B. 484, 487 (1964).

241. Voûte's construction of § 431 presupposes this to be proper. See *supra* note 31. To a similar effect, see Nysingh, Praeadvies N.J.V. 1929, at 61. On the parallel American rule, see Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 62-63 (1962).

242. It should be stressed that this is what actually happened in the *Fur Coat* case, in which the English executors had counterclaimed in the Dutch action for the costs awarded them in the English action. The lower Dutch courts held the plaintiff bound by the English judgment and awarded the defendants the relief prayed for on the counterclaim.

243. On the American merger rule, see Restatement, Judgments § 47 (1942).

244. On the inapplicability of the merger rule to foreign judgments, see Smit, *supra* note 241, at 55 n.78.

245. For the domestic rule, see N.V. Centrale Suikermaatschappij v. Van Poelje, Hoge Raad, June 30, 1932, [1932] N.J. 1410.

246. For the similar American rule, see Lynde v. Lynde, 181 U.S. 183 (1901).

247. *Supra* note 189.

VII. CONCLUSION

This comparative discussion of Dutch rules of international res judicata is designed to promote adoption of rules that lead to sound as well as predictable results. This objective can be accomplished by considerably narrowing the construction the courts have given section 431 of the Code of Civil Procedure and by substituting more definite standards for the general formula approved thus far by the Supreme Court. Now that the Supreme Court's powers of review are no longer limited to review of misapplication of statutory provisions, but also extend to improper application of rules of law generally, adoption of the more specific guidelines would seem particularly appropriate.[248] Previously, the Supreme Court, in the absence of a statutory provision that regulates the affirmative effect to be given to foreign judgments, could do little more than to give the lower courts the considerable leeway its formula affords.[249] But now that it can review particular applications of rules grounded in unwritten law, it can itself formulate more specific criteria.[250]

Adoption of the rules here evolved would not only give due consequence to pertinent res judicata policies, it would also appropriately extend the recognition given by the Netherlands to foreign judgments and thus contribute to the more effective functioning of the world community.

248. See notes 184-85 *supra* and accompanying text.
249. See *supra* notes 184-85, 206.
250. This is a consequence of the revision of the rules regulating review by the Supreme Court that, at least in this context, has not yet received the attention it deserves.